TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 558.

H. COYKENDALL, GARNISHEE, PLAINTIFF IN ERROR,

vs.

THE ILLINOIS & MISSISSIPPI TELEGRAPH COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED AUGUST 17, 1875.

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1 United States circuit court district of Iowa.

THE ILLINOIS AND MISSISSIPPI TELEGRAPH Company
vs.
THE DES MOINES VALLEY RAILROAD Company and H. Coy Kendall, garnishee. } At law.

Transcript.

2 Pleas in the circuit court of the United States of America for the district of Iowa, at a term thereof begun and holden at the United States court-room, in the city of Des Moines, in the State of Iowa and district aforesaid, on the second Monday of October, the same being the 12th day of October, A. D. 1874, before the Hon. John F. Dillon, United States circuit judge for the eighth circuit, and Hon. James M. Love, United States district judge for said district of Iowa.

3 Be it remembered that heretofore, to wit, on the 18th day of November, A. D. 1874, a writ of error was filed in the clerk's office of the circuit court of the United States for the district of Iowa, in a certain cause wherein the Illinois and Mississippi Telegraph Company is plaintiff and the Des Moines Valley Railroad Company and H. Coy Kendall, garnishee, are defendants, which said writ of error is in the words and figures following, to wit:

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Iowa, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between the Illinois and Mississippi Telegraph Company and the Des Moines Valley Railroad Company and H Coy Kendall, garnishee, a manifest error hath happened, to the great damage of the said H. Coy Kendall, garnishee, as by his complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together
5 with this writ, so that you may have the same at Washington on the 2nd Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the 18 day of November, in the year of our Lord one thousand eight hundred and seventy-four.

(Signed) GEORGE B. CORKHILL,
Clerk Circuit Court U. S. Dist. of Iowa.

Allowed:

J. M. LOVE, *Judge.*

(Endorsed:) The Ill. & Miss. Telegraph Co. vs. D. V. R. R. Co. & H. Coy Kendall, garnishee. Writ of error. Filed Nov. 18, 1874. George B. Corkhill, clerk.

6 In obedience to the foregoing writ of error I, George B. Corkhill, clerk of the circuit court of the United States for the district of Iowa, do hereby certify and return that the following transcript contains full, true, and complete copies of judgment-entry, præcipe for execution, execution, marshal's return on execution, motion for judgment on answer of H. Coy Kendall, garnishee, record entries appointing commissioners to take answers of garnishee, motion for judgment on further answer of H. Coy Kendall, judgment entry, bill of exceptions, and supersedeas bond in a certain cause wherein the Illinois and Mississippi Telegraph Company is plaintiff, and the Des Moines Valley Railroad Co. and H. Coy Kendall, garnishee, are defendants, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify and return that the original citation is hereto attached.

7 In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office in Des Moines, in said district, this the 17th day of March, A. D. 1875.

[SEAL.] GEORGE B. CORKHILL,
Clerk U. S. Cirt. Court Dist. Iowa.

7½ United States circuit court district of Iowa, May term, 1872, Friday, May 24, 1872.

ILLINOIS AND MISSISSIPPI TELEGRAPH COMpany
vs.
THE DES MOINES VALLEY RAILROAD COMpany. } No. 1105. Law.

This day this cause came on for hearing. The plaintiff appears by Cook, Richman & Bruning, and defendant by H. Strong & Witherow, and, a jury being waived, the cause is submitted to the court upon the pleadings and proofs offered; and the court, having heard the arguments of counsel and being fully advised in the premises, finds that there is due to plaintiff from defendant the sum of twenty-three thousand seven hundred thirty-four & $\frac{04}{100}$ dollars, ($23,734.04.)

It is, therefore, considered and adjudged that the said plaintiff have and recover of and from the defendant the said sum of three thousand seven hundred thirty-four $\frac{04}{100}$ dollars, ($23,734.04,) with interest thereon at the rate of six per cent., and costs of this suit taxed at $, and that execution issue therefor.

8 Circuit court of the United States, district of Iowa.

THE ILLINOIS AND MISSISSIPPI TELEGRAPH Company
vs.
THE DES MOINES VALLEY RAILROAD COMpany.

To the clerk of said court:

You will issue execution in above-entitled case fothwith.

(Signed) COOK, RICHMAN & BRUNING,
Attorneys for Plaintiff.

(Endorsed:) No. 1105. The Ill. & Miss. Telegraph Company vs. The Des Moines Valley R. R. Co. Præcipe for execution. Filed June 13, 1873. George B. Corkhill, clerk. Cook, Richman & Bruning, attys. for plffs.

9 UNITED STATES OF AMERICA:

United States circuit court district of Iowa.

The President of the United States of America to the marshal of the said district of Iowa, greeting:

Whereas on the 24th day of May, in the year of our Lord one thousand eight hundred and seventy-two, in our circuit court of the United States for the district of Iowa, before our judges thereof, the Illinois & Mississippi Telegraph Co. has recovered a judgment against the Des Moines Valley Railroad Company for the sum of twenty-three thousand seven hundred thirty-four dollars and four cents, for damages in a certain action decided in said court, together with $72.55 costs and charges by the plaintiff in said suit in that behalf expended, and $2.25 increased costs, which to the said Illinois & Mississippi Telegraph Company were adjudged as appears to us of record.

These are therefore to command you, that of the goods and chattles, lands and tenements of the said Des Moines Valley Railroad Company, you cause to be made the above amount, with six per cent. interest from date of judgment, and costs aforesaid, and that you have the same before the judges of our said court on the 2nd Monday *Tuesday* of October next, to render to the said Illinois & Mississippi Telegraph Co., and that you certify to our said judges how you execute this writ. Hereof fail not, and have you then and there this writ.

Witness the honorable Nathan Clifford, senior associate justice of the Supreme Court of the United States, this 13th day of June, in the year of our Lord one thousand eight hundred and seventy-three, and the 97th year of our Independence.

Issued at office in the city of Des Moines, under the seal of said court, the day and year last above mentioned.

[SEAL.] (Signed) GEORGE B. CORKHILL,
Clerk U. S. Circuit Court Dist. of Iowa.

10 (Endorsed.)

Return.

This execution came into my hands on the 13 day of June, 1873, and I served the same on the 16–19 day of June, 1873, by levying as set forth in paper hereto attached, and I hereby return the same.

Mileage 250 @ 10 c., $25.00; service on 40 $2.00, 80.00; copy 40 $1.00, 40.00—145.00. Paid by plff.

, *U. S. Marshal.*

By , *Deputy.*

(Endorsed:) Execution No. 1105. United States circuit court district of Iowa. The Illinois & Miss. Tel. Co., plaintiff, vs. Des Moines Valley Rail , defendant. Judgment 24 day of May, 1873, to October term, 1873. Damages $23,734.04; costs $72.55; increased cost $2.25; with 6 per cent. interest. Returned by marshal and filed the 25 day of

Sept., 1873. George B. Corkhill, clerk. Execution attorney, Cook, Richman & Bruning; residence, Davenport, Iowa.

11 I, Peter Melendy, U. S. marshal, do hereby certify that I did receive the annexed execution on the 13th day of June, 1873, and on the 16th day of June, 1873, I levied it by attaching as garnishees the following-named persons, and at the places named, to wit:

A. D. Woodrow,	agt.	of	D.	V.	R.	R.	Co.	Altoona,	Iowa.
W. S. Dowds,	"	"	"	"	"	"	"	Mitchellville,	"
J. M. Cox,	"	"	"	"	"	"	"	Prairie City,	"
A. Porte,	"	"	"	"	"	"	"	Monroe,	"
M. C. Gebhardt,	"	"	"	"	"	"	"	Ottey,	"
C. L. Walker,	"	"	"	"	"	"	"	Pella,	"
D. A. Gray,	"	"	"	"	"	"	"	Leighton,	"
M. C. Ruby,	"	"	"	"	"	"	"	Oskaloosa,	"
Geo. Brewer,	"	"	"	"	"	"	"	Given,	"
N. Peeler,	"	"	"	"	"	"	"	Eddyville,	"
A. W. Barker,	"	"	"	"	"	"	"	Comstock,	"
C. E. Boude,	"	"	"	"	"	"	"	Ottumwa,	"
T. H. Morris,	"	"	"	"	"	"	"	Alpine,	"
E. D. Dibble,	"	"	"	"	"	"	"	Ashland,	"
J. B. Harlan,	"	"	"	"	"	"	"	Independant,	"
J. O. Jackson,	"	"	"	"	"	"	"	Dowd,	"
E. Towne,	"	"	"	"	"	"	"	Kilbourne,	"
T. C. Jackson,	"	"	"	"	"	"	"	Summit,	"
N. B. Brown,	"	"	"	"	"	"	"	Bentonsport,	"
C. S. Detwiler,	"	"	"	"	"	"	"	Bonapart,	"
12 A. T. Church,	"	"	"	"	"	"	"	Farmington,	"
L. F. Riter,	"	"	"	"	"	"	"	Croton,	"
W. L. Riter,	"	"	"	"	"	"	"	Land Prairie,	"
C. W. Price,	"	"	"	"	"	"	"	Keokuk,	"

Arthur Bridgeman, acting treasurer of D. V. R. R. Co.
O. C. Hale, treasurer of D. V. R. R. Co., Keokuk.
Jno. Given, superintendent of " " " "

And June 17, 1873, on H. Coy Kendall, agt. of D. V. R. R. Co., at Des Moines, Iowa, and June 18, 1873, on—

M. D. Riddle,	agt.	D.	V.	R.	R.	Co., at Ashewa,	Iowa.
J. Jennings	"	"	"	"	"	Waukee,	"
G. Gephardt,	"	"	"	"	"	Dallas Center,	"
L. Gill,	"	"	"	"	"	Minburn,	"
W. Jennings,	"	"	"	"	"	Perry,	"
W. C. Wells,	"	"	"	"	"	Rippey,	"
C. Boyd,	"	"	"	"	"	Grand Junction,	"
S. Maddern,	"	"	"	"	"	Gourie,	"

And June 19, 1873, on—

C. Sholtz,	"	"	"	"	"		"
L. B. True	"	"	"	"	"	Ft. Dodge,	"
E. L. Smith, agent U. S. Express Co.,						Des Moines,	"
W. H. Quick, div. sup't	"	"				"	"

by informing each of said persons personally that he is attached as garnishee, and by leaving with each a written or printed notice, a

13 copy of which is hereto annexed, the blank after the word "To——" in first line being filled with the name of the person upon whom the notice was served in each instance, and I return the execution accordingly.

(Signed) PETER MELENDY, *U. S. Marshal.*
A. BOWERS, *Deputy.*

14 United States circuit court district of Iowa.

THE ILLINOIS & MISSISSIPPI TELEGRAH COMpany
vs.
THE DES MOINES VALLEY RAILROAD COMPANY. } Execution.

To ———

SIR: You are hereby notified that, by virtue of an execution issued in the above-entitled cause to me directed by the circuit court of the United States for the district of Iowa in favor of the Illinois & Mississippi Telegraph Company, plaintiff, and against defendant, for the sum of twenty-three thousand seven hundred and thirty-four dollars and four cents, and costs and accruing costs, I, Peter Melendy, marsha of said district, have levied, and do hereby levy, on the moneys, rights credits, and effects now due, or to become due, in your hands, and from you to said defendant, and by virtue thereof you are hereby required and
15 commanded to pay me, the said marshal, the sum of money due, or to become due from you to the said defendant, and to de liver to me all property, rights, credits, and effects that you may hold or have in your custody or control, or a sufficient amount thereof to satisfy said execution, in order that the same may be dealt wth according to law; and in default thereof you are further notified that you are required not to pay any debt due by you to the said defendant, or hereafter to become due, and that you must retain possession of all property of said defendant now or hereafter being in your custody or under your control, in order that the same may be dealt with according to law; and you are also notified that you are required to appear before the circuit court of the United States district of Iowa, wherein said judgment was rendered on which said execution issued, on the first day of the next term of said court, viz, October 13th, 1873, and answer such interrogatories as may then be propounded to you, or that you will be liable
16 for the entire amount of said execution with interest and costs.

Witness my hand and official signature this 13th day of June, A. D. 1873.

PETER MELENDY,
U. S. Marshal of Iowa.

17 United States circuit district of Iowa, October term, 1873.
Wednesday, October 22, 1873.

THE ILLINOIS & MISSISSIPPI TELEGRAPH CO.
vs.
THE DES MOINES VALLEY RAILROAD, A. D. Woodrow, et al. garnishee. } No. 1105. Law.

This cause came on this day for hearing, and on plff.'s motion it is ordered that the clerk of this court be, and is hereby, appointed a commissioner to take the answer of garnishees herein.

18 ILLINOIS & MISSISSIPPI TELEGRAPH CO.
vs.
DES MOINES VALLEY R. R. & H. COY KENDALL, garnishee.

Comes plff. and moves the court for judgment against said garnishee

on h's answer for the sum of $12,200, & on this motion asks that cause as to sd. Coy Kendall be con'd until next term.

(Signed) COOK, RICHMAN & BRUNING,
For Pl'ff.

(Endorsed:) Ill & Miss. Telegraph Co. vs. D. V. R. R. & H. Coy Kendall, garnishee. Filed Oct. 22, '73. George B. Corkhill, clerk. Mo. for judg't on answer. Coy Kendall, garnishee.

21 United States circuit court district of Iowa, October term, 1874.
Thursday, October 22, 1874.

THE ILLINOIS & MISSISSIPPI TELEGRAPH COMpany
vs.
THE DES MOINES VALLEY RAILROAD COMPANY and H. Coy Kendall, et al., garnishees. } No. 1105. Law.

This cause came on this day for hearing; on motion of Cook, Richman & Bruning, att'ys for the plaintiffs, it is ordered that a rule issue against each of the garnishes against whom judgment was rendered in this cause by default at the October term, 1873, of this court, requiring them to appear on the first day of the next term of this court and show cause, if any they have, why execution should not issue against them on the said judgment; and on motion of Gatch, Wright & Runnells, it is ordered that H. Coy Kendall, garnishee herein, be given, further time to answer to-day, and Geo. Wainscott, esq., is hereby appointed a commissioner to take such answer.

22 ILLINOIS & MISSISSIPPI TELEGRAPH Company
vs.
DES MOINES VALLEY RAILROAD COMPANY & H. Coy Kendall, garnishee.

And now on this 27th day of October, 1874, H. Coy Kendall having filed a further and additional answer as garnishee, comes the pl'ff by Cook, Richman & Bruning, its attorneys, & moves for judgment against said garnishee upon the answer & additional answer filed by him for the sum of twenty-seven thousand dollars.

(Signed) COOK, RICHMAN & BRUNING.
Att'ys for Pl'ff.

(Endorsed:) Ill. & M. & Tel. Co. vs. D. V. R. R. Co. & H. Coy Kendall garnishee. Motion for judg't. Filed Oct 27, '874. George B. Corkhill' clerk.

23 United States circuit court district of Iowa, October term, 1874.
Thursday, October 29, 1874.

THE ILLINOIS & MISSISSIPPI TELEGRAPH COMpany
vs.
THE DES MOINES VALLEY RAILROAD COMpany & H. Coy Kendall, garnishee. } No. 1105. Law.

This cause came on this day to be heard upon the motion of plff. for

judgment against the said H. Coy Kendall upon his answer as garnishee in this cause, the plaintiff appearing by Cook, Richman & Bruning, and the said garnishee appearing by Gatch, Wright & Runnells, his atty.; and the court, being fully advised in the premises, finds that the said Coy Kendall had in his hands and under his control, between the time of his attachment as garnishee herein and the 15th day of September, 1873, the sum of twenty-seven thousand dollars of the moneys of the said Des Moines Valley Railroad Company, subject to garnishment.

Wherefore it is considered by the court that the plaintiff have
24 and recover of said H. Coy Kendall, garnishee, the sum of twenty-seven thousand dollars, and that execution issue therefor.

25 United States circuit court district of Iowa, October term, 1874.

Friday, October 30, 1874.

THE ILLINOIS & MISSISSIPPI TELEGRAPH COMpany
vs.
THE DES MOINES VALLEY RAILROAD COMpany & H. Coy Kendall, garnishee. } No. 1105. Law.

This cause came on this day, and, on motion of Gatch, Wright & Runnell's, atty. for the garnishee, the order entered herein on yesterday, and recorded on page 277 of this record, is amended so as to read as follows, to wit: "This cause came on to be heard this day, upon motion of the plaintiff for judgment against the said H. Coy Kendall, upon his answer as garnishee in this cause, the plaintiff appearing by Cook, Richman & Bruning, its attorneys, and the said garnishee appearing by Gatch, Wright & Runnells, his attorneys; and the court, being fully advised in the premises, finds that the said Coy Kendall had in his hands, and under his control, between the time of his attachment as garnishee
26 and the 15th day of September, 1873, the sum of twenty-seven thousand dollars of the moneys of the said Des Moines Valley Railroad Company, subject to garnishment. Whereupon said Coy Kendall, by his said attorneys, stated in open court that he was able to establish by other evidence the truth of all of the matters and things stated in his said answer upon information and belief only, and asked leave to make such proofs thereof, which said request and leave were denied and refused by the court. Wherefore it is considered and adjudged that the plaintiff have and recover of and from said H. Coy Kendall said sum of twenty-seven thousand dollars, and that execution issue therefor; to which said finding, ruling, and judgment the defendant excepted.

27 BILL OF EXCEPTIONS.

In the United States circuit court, district of Iowa.

THE ILLINOIS AND MISSISSIPPI TELEGRAPH Company, pltff.,
vs.
THE DES MOINES VALLEY RAILROAD COMPANY and H. Coy Kendall, garnishee, defts.

Be it remembered that this cause coming, at the October term, 1874, on to be heard on the motion of the said plaintiff for judgment against the said garnishee, H. Coy Kendall, upon his written answers under oath, as such garnishee, the plaintiff, in support of its said motion, offered in evidence, in addition to service of process of garnishment upon

said garnishee on June 17th, 1873, the original said answer of the said garnishee, taken on the 22nd day of October, A. D. 1873, which said answer is as follows:

Answers of H. Coy Kendall, agt. at Des Moines, garnishee in case of Ill. & Miss. Telegraph Co. vs. The D. V. R. R. Co.

1st. Are you in any manner indebted to the defendant in this
28 suit, or do you owe it money or property which is not yet due? If so, state the particulars.

I do not consider that I do.

2nd. Have you in your possession or under your control any property, rights, or credits of said defendant? If so, what is the value of the same? State all the particulars.

Probably two hundred dollars; not to exceed that amount.

3*d*. Do you know any debts owing to said defendant, whether due or not due, or any property-rights or credits belonging to it, and in the possession or under the control of others? If so, state all the particulars.

I do not.

4th. Was there in your hands or under your control, on the 17th day of June last, at the time you were garnishe'd in this case, any money, property-rights, credits, or effects of the deft.? If so, state how much money, and what property-rights, credits, or effects were so in
29 your hands or under your control, and state how much, if any, money, and what property-rights, credits, or effects of the deft. have come into your hands or under your control since the said 17th day of June last past, and what is now in your hands and under your control. State fully and particularly.

Ans. I don't know what amount was in my hands on the 17th day of June, [1873;] since that time I have received thirty-seven thousand two hundred and seventy-seven $\frac{71}{100}$ dollars, ($37,277.$\frac{71}{100}$,) exclusive of the two hundred dollars which is now in my hands. This amount I have received and paid over to the company, and the amount I was responsible to the company for; but a large portion of it was received for through-tickets and freight, of which the deft. was entitled to a certain percentage only; the amount, as I understand it, which would be exclusively the earnings of the deft., I do not think would exceed twelve thousand dollars, and think it would be about that sum.

(S'g'd) H. COY KENDALL.

30 Subscribed and sworn to before me by H. Coy Kendall Oct. 22, 1873.

(Sgd.) GEORGE B. CORKHILL,
Clerk & Com'r.

I, George B. Corkhill, clerk of said court, appointed commissioner to take answer of garnishees in above cause, do hereby certify, that on the 22nd day of October, 1873, H. Coy Kendall, the above-named garnishee, appeared before me, and after being duly cautioned and sworn, the interrogatories above written were propounded to the said garnishee by me, and the answers of the said garnishee were written out immediately following the interrogatory; that after said interrogatories and answers were so written out the same were read over to the said Coy Kendall, and subscribed and sworn to in my presence by him.

Witness my hand the day and year above written.

(S'g'd.) GEORGE B. CORKHILL,
Clerk & Com'r.

(Endorsed on back:) Filed Oct. 22, 1873. George B. Corkhill, clerk.

31 At the October term, 1874, to wit, October 27, 1874, the said garnishee, upon his application, was allowed by the court to make further or additional answer, which answer is as follows, to wit:

ILLINOIS AND MISSISSIPPI TELEGRAPH COMPANY }
vs.
THE DES MOINES VALLEY RAILROAD COMPANY }

Additional answer of H. Coy Kendall, garnishee.

I was the agent of the Des Moines Valley Railroad Company, at Des Moines, from January, 1873, to October, 1873. My duty as such agent was to sell tickets, to receive the money therefor, to receive and ship freight, and to receive the charges thereon. Of the money received for the sale of tickets, a large proportion did not belong to the Des Moines Valley Railroad Company, but to other lines of railroad, as being the price of coupon tickets sold over same. In like manner as to cash received for freight, a large proportion belonged to other roads
32 from which said freights were received, and to which the Des Moines Valley Railroad Company was accountable therefor.

The apportionment of such monies so received was not made by me, and could not have been made by me, as I had no means of information to enable me to do so.

All the money received by me was regularly transmitted to Arthur Bridgman, the secretary and assistant treasurer of the Des Moines Valley Railroad Company.

The apportionment of such money was made in the usual course of business, by the proper officers, in the general office of the company at Keokuk. I do not know, and have no means of knowing, what proportion of the monies so received by me properly belonged to the Des Moines Valley Railroad Company. All the money mentioned and referred to in my former answer as garnishee herein, as being or having been in my hands, came into my hands as such agent, and from the sources above indicated, and was subject to the conditions and applica-
33 tion above stated. My duty as such agent required me to make remittances of all monies so received by me as often at least as once a week, and oftener, if money in sufficient amounts accumulated. For failure to make such remittances, I was liable to summary removal. [I am informed and believe, and had such information and belief at the date of the service of the garnishee notice herein on me, June 17, 1873, that all the ticket and other agents of the Des Moines Valley Railroad Company, whose duty it was to receive the earnings of said company for the carriage of passengers, freight, and otherwise, were garnishe'd at the same time that I was; and I am further informed and believe, and had such information and belief at the date of such service on me, that at the time thereof, and as long as said road continued to be operated by said railroad company, such earnings constituted the sole means whereby it was enabled to operate said road.]

(Part in brackets objected to as a conclusion of witness, and not a fact, and as being irrelevant & immaterial.)

(Part in brackets objected to as irrelevant and incompetent, and immaterial, and as giving opinions and beliefs, and not facts.)

Question. Have you any knowledge, from information or other-
34 wise, of any demand having been made, about the month of December, 1872, by the trustees of the first mortgage on the Des Moines Valley Railroad, upon the company for the possession of the road?

(Objected to as incompetent, irrelevant, immaterial.)
I have heard of such a demand having been made.

Cross-examination by the attorney of the plaintiff:

I was not in the employment of any person or corporation except the Des Moines Valley Railroad Co., at the times above specified. I was not responsible to any other company or person for the moneys that came into my hands, as above stated. The moneys received by me were, on all accounts, whether for freight or tickets, local or through, *were* kept in common and remitted in gross as received as above stated. After the garnishee process was served upon me, I was directed by the officers of the company to remit as usual, and was informed that an injunction was about being procured to stay proceedings
35 upon the garnishment. I said to the superintendent that I supposed I must obey the orders of court. He replied, you must remit as usual, and gave me to understand if I did not I would be removed.

The amount of money received by me between the time I was garnished and the 15th of September, 1873, on the day the receiver took possession of the road, was twenty-seven thousand dollars, or thereabouts. The thirty-seven thousand dollars, or thereabouts, mentioned in my first answer as having been received by me, covered the time from the date of the garnishment up to 21st or 22nd of October, 1873.

I do not know the amount of either the gross or net earnings of the road between the 31st of May and the 15th of September, 1873, nor for any other time during said year, nor do I know what proportion the net earnings bore to the gross earnings of said Des Moines Valley Railroad Company.

(S'g'd) H. COY KENDALL.

36 Subscribed and sworn to before me by H. Coy Kendall Oct. 27, 1874.

(S'g'd) GEORGE WAINSCOTT, *Coms.*

I, George Wainscott, commissioner appointed to take the further answer of H. Coy Kendall, garnishee in the foregoing case, do hereby certify that on the 27*st* day of October, 1874, the said garnishee appeared before me, and, after being duly cautioned and sworn, made the foregoing answers to the interrogatories propounded to him by me, and that these answers were taken down by me in writing and read over to the said Coy Kendall, and signed and sworn to by him in my presence.

Witness my hand this 27th day of October, 1874.

(S'g'd) GEORGE WAINSCOTT,
Commissioner.

(Endorsed:) Filed Oct. 27, 1874. George B. Corkhill, clerk.

37 And the plaintiff's said motion for judgment having been submitted to the court & argued by counsel for the plaintiff & for the said railroad company, represented, also said garnishee, the court took time to consider the same, & on the next morning proceeded to announce & state its conclusion that the said answers disclosed a liability on the part of said garnishee, whereupon the garnishee, by his counsel, in open court stated that if time & opportunity were given to said garnishee he could establish by other evidence the truth of the several

matters & things set forth in his answer upon information & belief only, & asked leave of the court to make such further proofs, which the court refused for the reason that said garnishee had already been given leave to make an additional answer, & because the plaintiff's proceedings herein had already been slayed for nearly a year by a bill in equity, brought by the trustees under mortgage of the railway company,
38 making the said company & the plaintiffs herein parties, which bill had been dismissed upon its merits at this term, to which ruling of the court, denying and refusing such leave, the said garnishee, Coy Kendall, at the time excepted; and no further or other evidence except the record in this action being offered by either of the said parties, the court sustained said motion and gave judgment upon said answer for the said plaintiff, whereupon the said defendant, Coy Kendall, prayed the court to sign and seal this bill of exceptions, which is hereby accordingly done.

JOHN F. DILLON, *Judge.*

(Endorsed:) 1105. The Ill. & Miss. Telegraph Co. vs. D. V. R. R. Co. & H. Coy Kendall, garnishee. Bill of exceptions. Filed Oct. 30, '74. George B. Corkhill.

39 Supreme Court of the United States.

THE ILLINOIS AND MISSISSIPPI TELEGRAPH COMPANY
vs.
THE DES MOINES VALLEY RAILROAD COMPANY & H. Coy Kendall, garnishee.

Know all men by these presents that we, H. Coy Kendall, George Smyth, and C. H. Perry, of Keokuk, Iowa, are held and firmly bound unto the Illinois and Mississippi Telegraph Company, corporation organized under and by virtue of the laws of the State of Illinois, in the sum of fifty-four thousand dollars, to be paid to the said Illinois and Mississippi Telegraph Company, its successors, representatives, or assigns. To which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and one and each of our heirs, executors, and administrators, firmly by these presents,
40 sealed with our seals, dated this 29 day of December, 1874.

Whereas the above-named H. Coy Kendall hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States in and for the district of Iowa: Now, therefore, the condition of this obligation is such that if the above-named H. Coy Kendall shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(S'g'd) H. COY KENDALL. [L. S.]
GEO. B. SMYTH. [L. S.]
C. H. PERRY. [L. S.]

Sealed and delivered in presence of A. Bridgman.
Approved.

J. M. LOVE, *Judge.*

41 (Endorsed:) 1105. Law. Ill. & Miss. Telegraph Co. vs. D. V. R. R. Co. & H. Coy Kendall, garnishee. Supersedeas bond. Filed Dec. 30, '74. George B. Corkhill, clerk.

42 UNITED STATES OF AMERICA, *ss:*

To the Illinois and Mississippi Telegraph Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, 1875, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States in and for the district of Iowa, wherein H. Coy Kendall is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States this day of December, A. D. 1874.

J. M. LOVE, *Judge.*

Service of the within citation & admonition upon the Illinois & Mississippi Telegraph Company is acknowledged to have been duly made this 2nd day of February, A. D. 1875.

The Illinois & Mississippi Telegraph Company,
By COOK, RICHMAN & BRUNING, *its Attorneys.*

(Indorsed:) 1105. Law. In U. S. C. C. Ill. & Miss. Telegraph Co. vs. D. V. R. R. & H. Coy Kendall, garnishee. Citation. Filed Feb. 3, 1875. George B. Corkhill, clerk.

43 Supreme Court of the United States.

THE ILLINOIS AND MISSISSIPPI TELEGRAPH Company, defendant in error, *vs.* THE DES MOINES VALLEY RAILROAD Company & H. Coy Kendall, garnishee, plff. in error.	October te'm, 1875.

And now on the first day of said term comes the H. Coy Kendall, garnishee, by his attorney, and says that in the record and proceedings aforesaid there is manifest error to his prejudice in this, to wit:

First. Upon the answer of said garnishee, the circuit court should have found for and not against the plaintiff in error.

44 Second. The answer fails to show liability as matter of law on the part of said garnishee as the debtor or otherwise of said railroad company.

Third. The court erred in refusing permission to said garnishee to show the truth of the matters stated in his answer.

Fourth. Upon the law and the facts the judgment of the court should have been for the plaintiff in error.

Fifth. Because of the errors apparent of record.

And said H. Coy Kendall prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to whatever he has lost by reason of said judgment.

GEO. G. WRIGHT,
Atty. for Plff. in error.

(Indorsement on cover:) No. 558. H. Coy Kendall, garnishee, plaintiff in error, vs. The Illinois and Mississippi Telegraph Company. Iowa C. C. U. S. Filed 17th August, 1875.

1875

240

Supreme Court United States

121 Otto

603-667

IN THE

SUPREME COURT

OF THE

UNITED STATES.

GILMAN AND OTHERS, TRUSTEES, *Appellants*, vs. THE ILLINOIS & MISSISSIPPI TELEGRAPH COMPANY, AND OTHERS.	IN EQUITY.
THE ILLINOIS & MISSISSIPPI TELEGRAPH COMPANY, vs. H. COYKENDALL, GARNISHEE, *Appellant*.	AT LAW.

APPEALS FROM THE CIRCUIT COURT OF IOWA.

By agreement, these two cases, growing out of the same transactions, are to be submitted together.

The facts, to state them briefly for the present, are as follows:

The K. F. D. & M. R. R. Co., in 1857, made its first mortgage to secure over $2,000,000 in bonds, upon its road from Keokuk to Des Moines, this mortgage covering everything

possible to cover by mortgage or conveyancer's language, including "all property owned or to be acquired, together with the tolls, rents, and profits to be had therefrom."

In October, 1868, this company, (its name having meantime been changed to that of Des Moines Valley R. R. Co., and having extended its road from Des Moines north-west to Ft. Dodge,) made its other mortgage to secure over $4,000,000, the same being made a first lien on the extended line and second on the old, or that between Keokuk and Des Moines. This second mortgage, like the first, covered everything, including "all rents, issues, incomes, tolls, profits, earnings, moneys, rights, benefits, or advantages, had or received in any way whatever." Both instruments provided that in case of default in the payment of interest on the bonds secured thereby, the trustees therein named might take possession of the road, "collect and receive tolls, freights, incomes, rents, issues and profits," &c., and after paying costs and operating expenses, apply the same on said mortgage indebtedness, &c.

The respondent herein, the Ill. & Miss. Tel. Co., on the 21st of May, 1872, recovered a judgment against said Des Moines Valley Railroad Company in the United States Circuit Court for Iowa, in the sum of $23,734.10.

The railroad company being largely in arrear on its interest on both these mortgages, amounting at the time in the aggregate to over $700,000, the trustees named in the second mortgage, in July, 1872, commenced their action in the Circuit Court of Polk county, Iowa, to foreclose the same, making all necessary parties, including the holders of the first mortgage and the respondent, and appellee in interest, the said Illinois & Mississippi Telegraph Company.

On the 31st of May following, a decree was entered by said Court finding the order of the several liens, and the amounts thereof, to be as follows :

1st. To the trustees under the first mortgage, $2,730,400.

2d. To one Walkley, $3,563.80, being next to and upon the same property as that covered by the first mortgage.

3d. To Flinn, $8,032.58; Marcey, $27,789.48, and O'Brien & Gugerty, $20,021.91, for mechanics' liens of equal priority, and first liens upon so much of the road north of Des Moines as is in Webster county.

4th. To the trustees under the second mortgage, $2,907,-293.33, being a first lien on the road north of Des Moines, (subject to the priority of the mechanics' liens aforesaid,) and a second lien on so much of the road as was covered by the first mortgage.

5th. To the Illinois & Mississippi Telegraph Company, subject and junior to all the liens above mentioned, $25,185.76.

June 13th, 1873, said Telegraph Company caused execution to issue on their said judgment, and garnished, in the hands of sundry agents of the railroad company, a large amount of the rents, incomes, &c., of said road; being moneys received by said garnishees as station agents from freights and passengers, and thereupon this proceeding was commenced to enjoin further steps under said garnishment.

The original bill for foreclosure asked the appointment of a receiver, and though the decree of May, 1873, did not so order, an amended decree was entered on the 9th of September next thereafter, by said Circuit Court of Polk county, all the parties, including said Telegraph Company, being in court, which contained, among other things, these provisions:

And it is further ordered that the purchaser at said sale of the railroad of said company, shall take the same subject to the unpaid claims, if any, of the employes and officers of the road, and all others, for labor in the operation of said railroad, from the time of the first publication of the sheriff's notice of sale of said railroad under this decree, up to the time of the said sheriff's sale of said railroad, to an amount not exceeding one hundred thousand ($100,000) dollars.

But in order to provide funds for the payment of these claims, and avoid, as far as may be, the imposition of said burthen upon the purchaser of said railroad, it is ordered that George B. Smyth be and he is hereby appointed special receiver of all the income and earnings of said railroad, during the same period between the first publication of said sheriff's notice of sale of said railroad, and the making of said sheriff's sale thereof, with absolute right and power to said receiver to take and receive all such earnings and income during said period; and said special receiver shall apply such earnings and income by him received, in the first place to the payment of the current expenses of operating said railroad, and to the purchase of necessary supplies to be used in operating said railroad during said period, and shall pay over any surplus to such person as the Court shall hereafter order.

In other respects this decree of September 9th follows that of May 31st, both alike ordering a foreclosure and sale, and to the provisions of which reference will, as far as necessary, be made in the course of the argument.

The answer of the Telegraph Company, not controverting any of the material matters above stated, insists, nevertheless, that intermediate the decree of foreclosure and sale, (which sale took place Oct. 17, 1873,) the rents, incomes, tolls, &c., after paying running expenses, were subject to attachment or levy under their judgment, and that by their attachment they acquired a lien thereon prior and superior to that of the mortgagees or judgment creditors.

The Court below so held, dismissed our bill, and upon the answer of the garnishee, Coykendall, rendered judgment against him for some $27,000.

In the order dismissing our bill, as well as in that finding against the garnishee, upon the facts stated in his answer, we claim the Court erred, as we think we can most conclusively show.

ARGUMENT.

First, as to Priority of Lien.

Upon the foregoing facts, and others to be referred to, we claim:

First, That said railroad company had legal capacity to and by each of said mortgages did mortgage its future earnings. As this proposition has not heretofore been, and probably will not be questioned by counsel for the defendant, we submit it without discussion, with the following citations:

Act of March 31, 1858, Rev. 1860, p 222.
Pennock vs. Coe, 23 *How.*, *117*.
Jessup, et al, vs. Bridge, et al, 11 Iowa, 573.
Dunham vs. Isett. 15 Iowa, 284.
2 Redfield Railways, 455, 485.
Galveston Railroad vs. Cowdry, 11 Wall., 453.

Second, We maintain that the company having power to mortgage its earnings, such earnings, when so mortgaged, became as much part of the bondholders' security as did the road-bed, rolling stock, or any other part of the mortgaged property. As to such of the earnings as had accrued before the foreclosure suit was commenced, they were either paid directly to the bondholders or applied, in aid of their securities, to the payment of operating expenses, etc. As to so much thereof as accrued after its commencement and before the sale, it was neither necessary nor practicable for plaintiffs to ask or take any special order with respect thereto. We can think of no order that could properly have been asked for or taken unless it had been an order for the appointment of a receiver. Under section 2217, Rev. of Iowa, 1860, in the absence of stipulations to the contrary, the mortgagor of real

property retains the legal property and right of possession.—It is questionable whether, under this provision, an order appointing a receiver to take possession of the road could legally have been made, and in any event we think it very clear that no such order would or should have been made without some showing that it was necessary for the protection and proper application of the earnings; and it does not appear that any such necessity existed. So long as the earnings of the road were faithfully and properly applied in accordance with the rights and interests of the bondholders by the officers of the company, there was certainly no occasion on their part for asking the appointment of a receiver or any other order whatever with respect to their collection, safe keeping or application. It was doubtless to the interest of the bondholders that the earnings should be thereafter until the sale of the road, as they had theretofore been, applied, as far as necessary for that purpose, to defray operating expenses. If this or any other application of them in accordance with their interests could as well and certainly be made without as with a receiver, the bondholders certainly should be in no manner prejudiced by their failure to have a receiver appointed.

The evidence shows what the earnings were from the date of the decree until the date of sale, and that they were applied just as they should have been had a receiver been appointed, and that they could not by any possibility have been so applied as to have paid off all of the bonds and left a surplus to be applied on the judgment of defendant, the Illinois & Mississippi Telegraph Company. It could only be heard to complain and ask for the protection of the fund by the appointment of a receiver, or otherwise, upon a showing that such protection was necessary, and that it had some interest in having the fund so protected. The deposition of Bridgeman shows the amount of earnings and the amount of the balance due each set of bondholders after crediting the amount for which the road was sold, from which it is clear that

the defendants could by no possibility have been interested in or benefited by the appointment of a receiver, or any other order or provision that could have been made with respect to the earnings of the road. The bondholders alone were interested, and if they were willing to trust the application of the incomes to the officers of the company until the sale, the Telegraph Company certainly should not be allowed to complain until it has shown itself injured thereby, or at least shown the possibility of such injury.

If the trustees of the bondholders, through the instrumentality of a receiver, could have secured the application of the earnings of the road in payment of the mortgage indebtedness, it must have been because of the lien of the mortgages respectively upon such earnings; or, in other words, because the earnings were part of the property mortgaged and equally with the other property subject to the mortgage lien. Assuming, then, that prior to and at the commencement of the foreclosure suit, the earnings of the road—as well those to accrue as those already accrued—were embraced in both mortgages and subject to the lien thereof, upon what theory can it be successfully maintained that as to the future earnings the lien was lost or became extinguished by a failure to ask for or obtain any order or provision in the decree with respect thereto.

It may be urged by counsel for defendant, that the lien of the mortgages became merged in and extinguished by the decree; in support of which they have heretofore cited a single case; *The People vs. Beebe*, 1 Barb., 379. Upon that question the opinion is very brief and was evidently not well considered. The reasoning of the Court in substance is, that a judgment at law *extinguishes* the *debt* on which it is obtained, therefore a decree of foreclosure *extinguishes* the *lien* of the mortgage foreclosed. The conclusion, it seems to us, is a *non sequitur*. In the first place, it is not true that a judgment at law extinguishes the debt upon which it is ob-

tained. The legal effect is only the merger of a lower into a higher evidence or form of indebtedness. The same indebtedness previously evidenced by note or book account, as the case may be, is thereafter evidenced by *judicial record*, the highest kind of evidence known to the law, not of the *extinguishment* of the debt, but of its continued *existence* in the highest form of indebtedness. While there is good reason why a lower evidence of indebtedness may be merged in a higher, we are unable to perceive any reason why a *mortgage* lien should be merged into a *judgment* lien. The foreclosure proceeding is not for the purpose of obtaining a better or higher order of *lien*, but simply for the purpose of *enforcing* an already existing and sufficient one. That the lien of a mortgage is *not* extinguished by decree of foreclosure is maintained in *Riley's Adm'r vs. McCord's Adm'r*, 21 Mo., 287, with much better reasoning than that of the contrary opinion in the *People vs. Beebe, supra.* The court, on page 287, say:

> The question in this case is whether the lien of a mortgage is merged in a judgment obtained in a proceeding under the statute to foreclose the mortgage. If the lien of the mortgage is extinguished by the judgment, the mortgagee is in a dangerous situation, such a one as would induce many mortgagees to forego the remedy provided by the statute, for the mortgage lien being extinguished by the lien of the judgment, obtained in the suit for a foreclosure, and the lien of the judgment taking effect from its rendition, if judgments should have been previously rendered against the mortgagor in favor of others, though subsequent in date to the mortgage, those subsequent judgment creditors would obtain a preference over a prior mortgage, though duly recorded. So proceedings for a foreclosure, under the statute, may be begun where any part of the mortgaged premises are situated. Mortgaged lands may be in several counties. The lien of a judgment is only operative in the county where it is rendered, so that, in such cases, the mortgage lien will be destroyed. It is the just expectation of the creditor that when he takes the mortgage he has a security that will last until the mortgage debt is paid. This is a reasonable expectation and should not be defeated unless the law plainly requires it.

And again, on pages 288-9.

> The judgment, itself, although by our statute it ceases to be a lien after three years, is not presumed to be satisfied until after the expiration of twenty years

from its rendition. Because a judgment has been rendered to foreclose a mortgage, why should the mortgagee be deprived of the security of the mortgage after three years, when the law only presumes the mortgage or lien of a judgment discharged after twenty years.

In this State, (Iowa) actions on judgments of courts of record may be commenced at any time within twenty years; or, in other words, an indebtedness may subsist for that length of time in the form of a judgment, while the lien of the judgment can only continue half that length of time. If, according to the the theory of defendant's counsel, the lien of the mortgage becomes merged in that of the judgment of foreclosure thereon, it must follow that the mortgage indebtedness in the form of a judgment, can survive the mortgage security, which would be contrary to what we understand to be the well settled law. The debt is the principal thing, the mortgage the incident, and so long as the debt exists the mortgage continues incident thereto. If an indebtedness, evidenced by a book account, be secured by mortgage, and the evidence of indebtedness be afterwards merged into the higher form of a promissory note or bond under seal, it has never been questioned that the security still remains incident to the debt. Why shall it not also remain incident thereto when the evidence of indebtedness is merged in the still higher form of a judgment? The purpose of the mortgage is to secure the *payment* of the indebtedness, and until that purpose is accomplished, it must continue to stand as security for its accomplishment.

In *State of Iowa vs. Lake*, 17 Iowa, 215, the facts in brief were that a senior mortgagee had obtained judgment in an action at law upon the mortgage indebtedness, issued general execution, levied the same upon the mortgaged premises, bought the same in for the full amount of the judgment, took a Sheriff's deed, and on the same day sold and conveyed the property to a third person and at the same time assigned to his vendee his mortgage. In an action by a junior mortgagee

to foreclose, to which the assignee of the senior mortgage was made a party, the court, on page 219, uses this language :

> Although the judgment was not, itself, as to the second mortgagees, a lien prior to the date of its rendition, yet it by no means follows that the mortgage lien was extinguished by the merger of the note into the judgment. On the contrary, the mortgage lien remains *until the debt is satisfied*, and is not affected by a change of the note, or giving a different instrument evidencing the debt, *or by a judgment merging the original evidence of indebtedness.*

But the court, notwithstanding, held that npon the facts of that case the lien of the senior mortgagee was extinguished by the purchase of the mortgaged premises in satisfaction of the judgment, and on page 221 uses this language :

> 'It is not to be denied that when a debt is once satisfied, all the incidents of the debt, including a right to foreclose a mortgage given to secure the same, are extinguished.' * * * In this case the senior mortgagee, by the sale and purchase of the mortgaged property under his judgment, received full payment of his debt.

Here we find the principle distinctly recognized and enunciated, that so long as there is a subsisting indebtedness, however evidenced, the *mortgage* lien remains "unaffected by a change of the note, or giving a different instrument evidencing the debt, or *by a judgment merging the original evidence of indebtedness.*

In this State, prior to the Code of 1873, it was provided that the lien of a judgment rendered in an action at law upon a note or bond secured by mortgage, should be a lien from the date of the recording of the mortgage, but there was no similar provision with respect to a judgment render in an equitable action to foreclose the mortgage, and now there is no such provision with respect to either. By section 2882, Code 1873, all judgments become liens upon real estate, within the county where rendered, from the date of rendition, and upon lands lying in any other county only from the date of the filing of an attested copy of such judgment in the office of the clerk of the district court of such other county. It must follow,

therefore, as it seems to us, necessarily, if the theory of defendant's counsel is correct, that mortgagees will often find themselves compelled either to forego the enforcement of their claims by suit, or, by attempting so to enforce them, to lose all benefit of their mortgage security. A owes B a debt secured by mortgage and at the same time owes C an unsecured debt. C obtains judgment, which, from the date of its rendition, is a lien upon A's real estate, *but subject to B's mortgage.* B at a subsequent term obtains a judgment, foreclosing his mortgage, whereby, according to their theory, the lien of his mortgage becomes merged in that of the judgment *and junior and subject to that of C.*

This does not accord with our idea of the doctrine of merger, which, as we understand it, is that a lower security, interest or estate may become merged in a higher, but never the reverse. While we cannot comprehend how the equity of redemption can become merged in the interest of a mortgagee or a debt by specialty in a simple contract indebtedness, or a fee simple in an estate for life, the contrary is not only comprehensible, but quite familiar. We can see nothing unreasonable in the doctrine that a lower evidence of indebtedness or security may become merged in a higher, but it seems to us it would not be "the perfection of reason," at least, to allow, by a false application of the doctrine, a higher and superior lien to be *submerged into* a lower and inferior one.

Third, If it be true generally that a mortgage lien is merged in a foreclosure decree, it will, in exceptional cases, be kept alive for reasons similar to those that operate to prevent merger in other similar cases. It is familiar law, that, although ordinarily when the mortgage interest and the equity of redemption unite in the same person, the former will become merged in the latter, yet when the interest of the common owner requires that they shall remain distinct and separate, such will be presumed to have been his intention and the lien

of the mortgage will be kept alive for the purpose and to the extent of upholding such interest.

We can see no reason why the same rule for the same reason shall not be held to apply in favor of the bondholders in the case at bar to the extent of keeping alive the mortgage lien as to the item of earnings to whatever extent their interest requires.

Fourth, If it be true that by foreclosure the mortgage lien becomes merged in that of the judgment, it can only be true to the extent that the mortgaged property is, by the proceedings and terms of the decree, sought to be subjected to the payment of the mortgage indebtedness. In other words, if two parcels of property are embraced in the same mortgage as security for the same indebtedness, a foreclosure proceeding and decree looking to and providing for the sale of one of the parcels only, would not operate to extinguish or as a merger of the lien as to the other. It is not unfrequently true that lands located in different counties and even in different States, are embraced in the same mortgage as security for the same indebtedness. In some of the States by statute, and everywhere by the common law, the action to foreclose is local, and can only be maintained in the county where the mortgaged premises are situated. It will hardly be claimed that where such is the case, a foreclosure suit in one county as to so much of the mortgaged premises as are located therein, would operate to extinguish or as a merger of the lien as to the part of the premises located in the other county or counties; or where the premises are partly in one State and partly in another, that a foreclosure as to the part located in one State would have a similar operation as to the part located in the other. Nor do we know of any reason why the same may not be alike true as to distinct parcels of property so located or situated as that the mortgage may be foreclosed as to both in the same suit.

If, therefore the earnings in question constituted a distinct and separate item of the mortgaged property and were not included in or disposed of by the decree in the foreclosure suit, there is no reason why they may not yet, by supplemental or other proceeding, be subjected to the payment of the balance due on the mortgaged indebtedness. If, however, they were not an item separate and distinct from the other mortgaged property, but were simply an incident to the road, the principle thing mortgaged, which we think is the correct view, they should be treated in all respects as an incident only and affected by whatever affected the principal thing as a part is affected by whatever affects the whole.

The decree for the sale of the road was in legal effect, also a decree subjecting its earnings to the payment of the mortgaged indebtedness. The earnings were in their nature incident to the road, and by the terms of the mortgage were with it and as part of it pledged to the payment of the same indebtedness. As we have already said, we know of no way in which the mortgage as to the earnings could have been foreclosed otherwise than it was.

It was neither necessary nor proper for complainants to ask either that the earnings of the road should, by the decree, be declared subject to the mortgage lien or that execution or any process whatever should issue to subject the same to the payment of the mortgage indebtedness. They were, by the terms of the mortgage, already subject to the lien thereof, and they were not in their nature susceptible of being subjected to the payment of the debt by any process usual in foreclosure proceedings. As before suggested, we know of no order that could, under any circumstances, have been appropriate to that end unless it had been an order for the appointment of a receiver, which could in no sense have conferred upon complainants any *additional right* to have the earnings so applied, but would simply have been a means of securing their application in accordance with the right already existing and not contro-

verted, for we do not understand defendant to controvert that complainants might have so framed their decree in the foreclosure suit as to have secured such application.

Fifth, It appears from the deposition of Bridgman that from the date of decree to the date of sale, the gross earnings of the road were $218,887.07, of which $191,636.81 were applied to the operating expenses of the road for the same time; $25,000 to the payment of mechanics' liens provided for in the decree, being the liens of Flynn and others which were held to be the first liens as to that part of the road lying in Webster county, and the balance on pay rolls due prior to the decree ; from which it is apparent that the earnings in controversy, and which defendant is seeking to subject to the payment of its judgment, were required for the payment, directly or indirectly, of liens prior to that of defendant.

That the bondholders and mechanics' lien-holders had the right, as against defendant, to have the earnings of the road subjected to the payment or in aid of their indebtedness, will not be denied ; nor can it be denied that it was essential to the protection and preservation unimpaired, of the prior liens of the bondholders, that the earnings of the road should be applied to the payment of the operating expenses of the road and the discharge of the mechanics' liens for the payment of which that part of the road lying in Webster county was first liable,—the sale of which would seriously have injured the value of the remaining security of the bondholders.

Not only so, but we ask the Court to remember that this claim by appellee for these rents and profits is made in the light of the admitted fact that respondent is in this Court without any possible equitable standing. Counsel do not controvert that these earnings were covered by complainants' mortgage, and they would beyond all qnestion admit that under a proper decree they might have been subjected to the payment of the mortgage debt. They stand hence upon what

they have, after no little effort tortured into a technicality,(and it is not that even,) that because there is a so-called *omission* in the decree, we have thereby lost what they propose to gain. And hence it has been and probably will be argued again, that as other liens, such as those under attachment, execution and judgment, may be lost,—as they require certain positive acts to maintain them, which if forgotten, overlooked or neglected, such liens perish, so it may occur as to the lien of a mortgage. Or still again, it will probably be insisted that a "little oversight in a proceeding" may be fatal and that having taken our decree, we cannot be heard to say that our original lien is larger or more extensive than that given by our decree.

Appellee thus makes a man of straw and proceeds with blows far more ponderous than necessary to demolish it. We do not propose to go back of or behind our decree. We are not here asking the Court to consult the contract for the sole purpose of giving us something denied to us by the decree, nor to give us relief contrary to or in the face of the decree. It is no part of our theory that we are entitled to these rents and profits upon the contract alone and without reference to the judgment or decree.

If appellee had attempted to attach the earnings *before* foreclosure, it will not be pretended that they would have been subject to the writ. Nor would there be any claim that this creditor could reach these earnings *after* the sale. But intermediate the decree and sale, it is said that what was an undisputed paramount lien by the contract of the parties is lost. And why? Is there anything in the decree itself that warrants such conclusion? Let us look just here again at the actual transaction.

The mortgage was as much a lien upon the rents, issues, incomes, tolls, profits, currency, moneys, rights, benefits and advantages, derived or to be derived, had or received, as upon the lands, rolling stock, road bed, or anything else in said con-

tract named. It provided that the railroad company could possess and manage said road so long as default should not be made in the payment of the principal and interest of the bonds, and the company should keep all the covenants in said indenture contained. In case of default in the payment of interest, the trustees were authorized and empowered * * "to collect and receive all the tolls, freights, incomes, rents, issues and profits of the same, (of the road) and of every part thereof," * * and out of the moneys so received for said tolls, &c., after deducting expenses, costs, &c., * * pay said mortgage bonds, or if insufficient to pay all, divide the proceeds *pro rata* among the outstanding bonds." The petition for foreclosure prayed that said tolls, incomes, &c., after paying running expenses, should be applied to the payment of the bonds, secured by the mortgage, and that in default of payment by a day named, the property conveyed by the mortgage and every part and parcel thereof may be sold, and the proceeds applied to the payment of said debt, that the priority of liens held or claimed by the respective parties defendant, (including the Illinois & Mississippi Telegraph Company,) be ascertained and declared, &c.

Such being the contract and such the prayer and objects of the petition, the Court found in the first decree, among other things, as follows, (all the parties being before the Court:) that the mortgage of February 6, 1867, was the *first lien* upon the road south of Des Moines, with all its appurtenances and franchises, that Walkley's judgment was a second lien upon the *entire property* of said road, &c., that the lien of respondent, (Illinois & Mississippi Telegraph Company), was a lien upon the property, subject however to all other liens, and in default of payment by the Railroad Company of the amounts found due the parties above and elsewhere in said decree named, it was ordered execution should issue, that the entire railroad, &c., and any and all personal property belonging to said road should be sold, and that the proceeds be ap-

plied to the said several lien holders in the order named, the respondent, (The Telegraph Company,) being the last named in the list of creditors. The amended decree of September 9, 1873, which so far as now material, it is believed does not differ from the first entered, except, as we have stated, provided for the appointment of a special receiver of the incomes, and earnings, be to apply them to the payment of the costs, expenses, &c., the surplus, if any, to be paid to such persons as the Court might thereafter order. This order, as all other modifications of the original decree, were made, we know, without prejudice to the rights, if any, of the Telegraph Company.

And now, this (Telegraph) Company claims that having levied upon this income prior to said second decree, they have a lien paramount to all other creditors, anything in said mortgages or decrees to the contrary, notwithstanding. And we ask again, why? The exception in the second decree in favor of their rights, if any, amounts to nothing. Not having consented to the modifications or amendments—and they did not—they would not thereby be estopped from taking steps to set such decree aside. But whatever the legal or equitable effect of such amendments upon their rights they are concluded, such exception being in, just as they would if it had been omitted. For they have taken no step for the modification of said second decree. It was entirely competent for the Court, all the parties being before it, to modify the first order, and if in any respect the first failed to protect or preserve the rights of the several parties under their mortgages and judgments, to so amend or change it as that this result should be accomplished. If in doing so any party claimed he was injured, or that there was prejudicial error, he had his remedy. If he failed to avail himself of such remedy, the legal effect or operation of such amendments would be the same, whether rights were or were not, in terms, reserved. That is to say, if the Telegraph Company had rights which could not be affected

by this modification, or which were not, by the decree, interfered with, then the exception was quite unnecessary or unavailing. If the legal effect was to postpone their assumed claim of priority, then if they took no step to reverse or set aside this order, the exception is of no value whatever.

But again, if necessary to preserve admitted liens and equities, this Court will, as they can with entire consistency, treat the modification in the last decree for the appointment of a receiver, as a *nunc pro tunc* order. The Telegraph Company had not, in the meantime, in any manner relying upon the first decree, so changed their relation to this property as to claim prejudice from such modification. They had not surrendered any lien or security intermediate this decree. They had not purchased anything nor parted with any money. Now, assuming that we lost something by claimed omissions in the first decree, was there no power to correct and save this? Thus suppose nothing had been said about the lands mortgaged in the first decree, and the Telegraph Company, the last lienholder, had at once, in the exercise of that diligence which our friends, the counsel on the other side possess in a very superior degree, levied on one or more tracts thereof, could they be heard to say, your mortgage is merged in your judgment, you were guilty of a fatal mistake, omission or neglect, and now all these lands are lost to you, and this Court cannot, by any subsequent order, in the least affect or postpone the priority acquired by our execution and levy? And yet the lands were no more mortgaged than these earnings. If we could have our decree amended, and the order made for the sale of the lands, and so made as to relate back and preserve our lien, as against some intervening levy, in favor of a junior lien holder, then why not do the same as to these earnings? This doctrine of merger, so persistently, and as we erroneously and inapplicably invoked, is not an rule to be applied in the face of reason and most quities. There is such a rule, found among the

first we learn in equity jurisprudence, that equities will be kept alive when to extinguish them would be in the face of the intention of parties, and work clear and manifest injustice. And this will be done with equal promptness and consistency when to deny these equities would defeat the intention and purpose of the Court in its judgments.

The talk about the rights of a judgment creditor to take the rents of property after mortgage, that a mortgage is a mere lien and does not pass an estate, that until the equity of redemption expires the mortgagor may control the rents and profits; we say all this is idle, inasmuch as while in ordinary mortgages the rents or issues are not included, in this case these rents were as much included and conveyed as any part of the railroad or any property of the company therein named.

The whole claim of the appellee, therefore, rests upon the simple and single ground that, though our mortgage was prior and though it was an admitted paramount lien to that of the Telegraph Company, and all others, too; it is lost because it was not in terms named, recognized and declared in the first decree. Not because it was denied or refused in such decree, but because, as they insist, it omitted to make provision for the collection of such rents and income, and their disposition, by a referee or otherwise.

But again, by this very proceeding we ask or make a *demand* that these rents and profits may be applied to the payment of our mortgage or other prior liens. If they had been so applied the appellee could not reach them. They find, however, as they think, a part of our security in such a form as that they can seize it. Before it is applied or gone to the place where by the clearest equities of the parties it should go, they levy upon it and say it should pay a lien long postponed. If allowed to do so they work injustice to us, by depreciating, to the extent of the amount seized, our security.—While matters stand thus we come to the proper tribunal and

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demand that our equities shall be recognized and enforced. And against this demand, though the other side has not changed in the least its relation to this property by any claimed default or neglect of ours, they say our demand is too late, that their equity is strongest and this Court should so decree. That this will be done, we cannot for a moment believe.

We are referred, however, to *Galveston Railroad vs. Cowdrey*, 11 Wall., 459. And though his Honor, Judge Dillon, in the Court below, seems to rely largely, if not entirely, upon that case, we must be allowed to say, with all due respect, that the facts in this case fall far short of bringing it within that.—There the railroad, after being mortgaged, was sold under judgment (whether rendered before or after the mortgage liens attached does not appear) the purchaser taking possession thereunder, running and operating such road for *seven* years, making repairs, adding to the rolling-stock, extending the line, and generally exercising every and all acts of ownership. And thus it will be seen that such purchaser had reduced such rents to *possession* before demand, before any foreclosure, before any claimed default. The bondholders permit some years to pass before setting up any claim to such rents. Here defendant has not reduced these incomes to possession, has had no control of the road, merely asserts an equity based upon what is insisted to be a legal seizure of such profits, says that they belonged to the railroad company as against our mortgage at the time of their levy and therefore are subject to it, and we, instead of waiting for years assert our claim to priority at once, before answer by the garnishee, and before it can be said, upon any pretext or any ground whatever, that respondent could be prejudiced by our delay.

Not only so, but Justice Bradley, in his opinion, in speak- of the language of the deeds of trust (or mortgages) in that case, says that 'They convey the tolls, incomes, &c., *whenever the company shall be in default of payment.*" In our case the

conveyance of the tolls and income is just as immediate, absolute and unconditional as that of the road bed or other property. It is not contingent upon default of payment. No notice of default was necessary to perfect our lien or right to such tolls and income. And while therefore we might not find it necessary to controvert the proposition that under the language of the deed in that case and the facts therein disclosed, the defendants were not bound to account for the tolls, having reduced them to their possession, we think the case is very different under our deed; where we demand the tolls against the company, while our foreclosure proceeding is pending, and against a junior creditor, before they are reduced to possession and when we are prompt and diligent in asserting our rights. There the defendants had some show of equity, growing out of the delay of the mortagees, while here this little technical claim is met and paralyzed because plainly in conflict with our superior equity. Their equity is junior and must yield, because subordinate to ours, which is prior and paramount.

Not only so, but if the doctrine of the case, we are considering, is the law as applied to ours, then respondent could have held these incomes, if the levy had been made *before* steps for foreclosure, just as well as after, a doctrine for which counsel on the other side do not contend, putting their case as they do alone upon the ground of the merger of the mortgage in the judgment.

And may we not insist therefore that the case referred to is not applicable, and claim also with confidence in the language of the opinion in *Jessup vs. Bridge, et al.*, 11 Iowa, 576, that the Court will not allow a mere technical rule to stand in the way of a public demand, especially when they can make an adjudication that will subserve the purposes of justice, of public policy, and carry out the intention of the contracting parties. The case just cited we may as well remark here as elsewhere, is strongly, clearly in point in support of our bill, and we refer

to it, as also *Dunham vs. Isett*, 15 Iowa, 284, where the Supreme Court of Iowa hold very explicitly that the bondholders might enjoin a judgment creditor of the road, who by garnishment sought to subject the income and tolls of the road to the payment of his debt. They are in our judgment very much more in point than the case relied upon, and upon which we have just commented, by the Court below.

And see *Long vs. Matheison*, 2 Giff., 71.
Furness vs. Chaterham Railway, 29 Beav., 358.
State vs. North Central, 18 Md., 193.

In support of the case in 11 Wallace, his Honor, the Circuit Judge, however, cites two others, *City of Bath vs. Miller*, 51 Maine, 341, and *Noyes vs. Rich*, 52 ib., 115. We have examined both and think them even more unlike this than that which they are supposed to sustain. A word or two as to each will sufficiently show this.

In the first case it was held as to the *wood*, (which was the property in controversy,) *first*, that the plaintiffs, (the mortgagees,) failed to show *title* by either of their mortgages, because it was never *covered by either*. In the next place it was found that the mortgages gave the right to take possession, (upon default,) of all the property of the railroad company, *as it should be at the time of possession taken for default of payment*, and not at the time the mortgages were *given*, that as the wood was attached by a creditor of the company *before default or possession taken*, the bondholders could not reach it. And finally it was held that plaintiff had not proceeded to enforce its lien, (if any it could possibly have,) in the manner, (and only manner,) provided by the *statute* giving the right and under which the mortgages were made. If there is anything in all that case in conflict with what we claim, we surrender at discretion.

The second is even less in point. The action was *assumpsit* by a receiver appointed to take possession and charge of

certain property of the railroad company, against the Superintendent, for a small sum of money which he had in his hands and which had accrued by operating said road *before* default and *before* possession by the receiver. It was held that the right of the receiver only extended to the *property in controversy*, as shown by the proceeding under which he was appointed, that the suit by the creditors under which he was appointed was not a *general creditors'* bill, did not seek to reach all the property, but certain specified property, that the mortgage did not attach to this money, *nor was the plaintiff appointed to take charge of or receive that*,—that the rights of other lien holders not before the Court were involved,and therefore, most naturally, logically and necessarily it was held that the plaintiff as a receiver thus appointed could not maintain the action. That case may be ever so well decided and yet it in no manner bears upon ours. We feel quite certain that the most excellent and able judge, in ruling our case, could not have given to this or the other case from Maine his accustomed attention, else he never would have cited them in support of his judgment.

SECOND, AS TO JUDGMENT AGAINST GARNISHEE.

We come in the second place to consider, very briefly, the errors assigned in respect to the judgment against Coykendall, the garnishee. Of course if we are right in our other appeal, and it shall be found there that our equities are paramount, it will be unnecessary to consider this, as there will be, in that case, nothing to which the garnishee would be required to answer. As both cases, however, are to be submitted on the same argument, or at the same time, we proceed to consider this answer and the judgment thereunder.

We are doubtless warranted in assuming that this judgment against the garnishee, followed in the mind of the Court below, almost necessarily as a corrollary from the conclusion

that the earnings of the road could be levied upon by a judgment creditor. Keeping in mind that we deny this and that under no circumstances, certainly not under those disclosed in the principal case, as we have attempted to show, could this judgment creditor thus proceed; ~~do~~ We also claim that upon the answer itself this garnishee would not be liable even if the creditor was entitled to seize the railroad earnings.

What is the answer? Briefly, this: that he (the garnishee) was agent of the railroad company at Des Moines, as such, received between the time of garnishment and the date the receiver took possession of the road, $27,000—of this, (all being received for freight and tickets) a large proportion did not belong to the company but to other lines of road. He had no means of information as to what proportion of such receipts belonged to his principals, (the debtors herein) and what to others, but he says that he transmitted them regularly as had been his custom, and his duty also, to the treasurer who made the apportionment, and he was not able to tell what proportion the gross earnings of the road for the time named (from the 31st of May to the 15th of Sept, 1873,) bore to the net earnings.

Now upon this answer we insist the garnishee was not liable.

This answer stands uncontradicted. Standing thus, there is no liability unless it is *clearly* shown, for his liability is not to be *presumed*. This is the well established rule in Iowa, (*Smith, Twogood & Co. vs. Clarke & Henley*, 9 Iowa, 241.) If there is a *reasonable doubt* of his indebtedness, he should be discharged (*Church vs. Simpson*, 25 ib., 408.) Judgment not authorized unless it appears that he is legally indebted to the defendant in the action (*Victor vs. Fire Ins. Co.*, 33 ib., 210). And see *National Bank vs. Perry*, 29 ib., 266, *Meeker vs. Sanders*, 6 ib., 61. His liability must be *affirmatively* shown, (*Morse vs. Marshall*, 22 ib., 290; *Farwell & Co. vs. Howard*, 26 ib., 381. Liability to garnishor no greater than to his cred-

itor; *Wilson vs. Albright*, 2 G. Gr., 125; *Williams & Cunningham vs. Housel*, 2 Iowa, 154; *Bebb vs. Preston*, 1 ib., 460; *Fifield vs. Wood*, 9 ib., 249. He is not to be placed in a worse situation by the garnishment than if the attachment defendant was himself prosecuting him. (*McCoid vs. Beatty*, 12 ib., 399; *Burton vs. School District*, 11 ib., 166. Burden of showing liability on the party seeking to fix it. (See same cases.) The rule is that he will be entitled to his discharge unless enough appears to render him liable (Drake on Att. § 461, 5 Ed.) And see this rule discussed in *Porter vs. Stevens*, 9 Cash. 530, which reviews an apparently contrary rule (dicta) in *Webster vs. Gage*, 2 Mass. 503; also, see *Lane vs. Felt*, 7 Gray, 491, *Driscoll vs. Hoyt*, 11 ib, 404. We ask special attention to this last case. Also, see *Harris v. Aiken*, 3 Pick., 1; *Chapin vs. Conn. R. R. Co.*, 16 Gray, 69.

Applying these rules and the principles deducible and clearly applicable to this class of cases, this garnishee should have been discharged. How can it be said that it *affirmatively* appears that he *had any money in his hands belonging to the railroad company?* This judgment creditor certainly would have no right to money belonging to other companies, and it as well appears that the money in his hands belonged to others as to the Des Moines Valley Company.

It was no part of the duty of the garnishee to apportion this fund, or to distinguish between what belonged to one line or company and another. Indeed he could not. If plaintiff in that proceeding relied upon his liability or upon the grounds that *some* portion of these receipts belonged to the Des Moines Valley Company, he should have shown it *clearly* either by the answer or evidence *aliunde*. The Court had no right to *guess* it out. If this judgment is to be upheld, then other corporations or connecting lines had better keep their coupon tickets at home for *their* money can be attached in the hands of a ticket agent of a road, more or less embarrassed ment, and though the agent discloses all the facts in his

power, he is answered, you ought to have known or disclosed more, and therefore cannot be discharged. The rule followed in this case is, as we think, without precedent, and in every respect dangerous. This agent fully and frankly stated how much he had received, but whether it was the money of his principal, or if so, how much, he did not know—could not and did not tell—and yet he is made liable for *all.* We are treating the money as if it was all still in his hands. Being there he says he did receive so much money, but whose it is, I do not know. And thereupon the Court says it *affirmatively and clearly* appears to be the money of the defendant in executio, and you are held accordingly. The garnishee might have been required to answer further, or issue might have been taken on his answer, and the clear and affirmative case attempted which the law demands. But plaintiff (in the levy) *upon the answer alone* asked judgment. The garnishee was not negligent—nor in contempt of court—nor did he do anything to show that he was other than indifferent between the parties. And why he should be made upon this answer to suffer to the amount of this large judgment is more than we can understand.

We repeat that both these judgments or findings ought to be reversed and set aside, and for this we most respectfully ask.

GEO. G. WRIGHT,
of Counsel for Appellants.

EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

U. S. Supreme Court.

GILMAN AND OTHERS,
Appellants,

vs.

THE ILLINOIS & MISSISSIPPI TELEGRAPH COMPANY AND OTHERS,
Respondents.

No. 557.

H. COYKENDALL, Garnishee,
Plff. in error,

vs.

THE ILLINOIS & MISSISSIPPI TELEGRAPH COMPANY,
Deft. in error.

No. 558.

Brief of Mr. EVARTS, *of counsel for the appellants and for the plaintiff in error, in reply.*

The differences in the view of the facts in these cases, as disclosed in the respective briefs of the parties herewith submitted, are not of importance enough

to require any criticism from me or any attention from the court. The pleadings are very simple, the evidence quite limited, the point in dispute clearly presented in the opinion of the learned judge below (Judge Dillon), delivered in the principal case, and fully discussed in the opening brief of my associate counsel, and in that of the learned counsel for the respondents in the principal cause, the defendant in error in the second cause, in answer to our opening brief.

I do not propose to repeat the arguments or authorities of our opening brief, nor much to discuss the arguments of our opponents, which are directed in answer to the views presented so fully in the brief of my associates. A full consideration of the subject, in the light of our opponents' argument, satisfies me to leave the contention on our part, on these points, upon the opening brief.

It is, however, of some importance to extricate the real point of dispute between the parties from some confusion and obscurity in which it is involved by the expanded discussion of the general subject which the briefs contain.

Before asking the attention of the court to the controversy on the merits in the principal cause (No. 557), a few observations may be necessary in regard to some preliminary considerations, unconnected with the merits, presented upon the opposing brief.

I.—Our opponents criticise the opening brief of my associates, as wanting in that particularity and discrimination in the presentation of the subject which the 21st rule of the court requires. In answer to this criticism it is sufficient to say :

(*a.*) The rule applies only to briefs to be presented and filed in preparation for, and in aid of, an oral argument in open court.

(*b.*) The only relief, in case of an imperfect brief on the part of the appellant (in cases to which the rule does apply), is for the respondent to object to the court's considering errors not assigned, or to move to dismiss the cause.

(*c.*) But an inspection of the brief criticised will show it to be *omni exceptione major*. All that the rule requires in this behalf, "*in cases brought up by appeal*," is, that "the assignment shall state, as specifically as may be, in what the decree is alleged to be erroneous."

A reference to page 4 of our brief will, show a complete compliance with this rule. There is but one point in the principal cause (an injunction bill), and the facts and the respective claims of the respective parties having been succinctly stated as bearing upon that point, the decision of the court is stated, and the error claimed is pointed out.

Applts' Brief, p. 4.

II.—The *Record* is stigmatized, as not containing all the evidence in the cause, and the consequence claimed for this defect is "that the decree rendered by the court below, must be affirmed."

No doubt, the appellants must base their argument, and their hopes of reversal of the decree below, upon what *does* appear in the record. So, too, the respondent if the record, *as it stands*, justifies and requires a reversal of the decree below, has no help from that result, except by alleging, at the proper time, and in the proper form, *diminution of the record*, and asking for the supply of the deficient matter.

But, in substance, there seems no foundation for the difficulty raised, and apparently, seriously insisted

upon in the respondents' brief. The pleadings and proofs contain the allegations and testimony upon which the plaintiffs below rested, and the defendants below resisted, the case and the relief asked.

The preliminary criticisms disposed of, we find the controversy in the principal case a very narrow one. It may be thus stated:

The Des Moines R. R. Co. executed mortgages upon its property, and, in terms, covered by the lien, "all rents, issues, incomes tolls and profits, &c.," and gave the mortgagees a right, upon default in interest, to take possession of the road and collect its revenues, and apply them on the mortgage debt.

The defendant, the telegraph company, recovered a judgment against the R. R. Co., for $23,734.10, *May* 21, 1872, and took out no process upon the same, until and except as hereinafter stated.

The mortgagees commenced a foreclosure suit on the second mortgage, in *July*, 1872, setting forth the terms and lien of their mortgages as covering all the incomes and earnings of the railroad, and making the Telegraph Company a defendant, by reason of its judgment, and alleging its lien to be inferior to that of the mortgage. The telegraph company appeared in the suit.

On the 31st May, 1873, a decree was had in the foreclosure suit, establishing the rights and liens of the mortgagees, the inferiority of all the liens of other defendants, and placing the lien of the telegraph company's judgment as fifth and last in order.

June 13, 1873, the telegraph company issued execution on its judgment, and thereupon served process of garnishment upon ticket agents of the railroad company, to subject their receipts of earnings of the road to the satisfaction of the judgment.

September 9, 1873, an amended decree was made in the foreclosure suit, all the parties, *including the telegraph company*, being in court, whereby a special receiver was appointed of the income and earnings of

the railroad company during the interval between the sheriff's first notice of sale and the actual sale of the road, whenever it should be made. The receiver was to collect all the income and earnings of the road, pay thereout the running expenses, and pay the surplus as the court should direct. The special receiver took possession September 15, 1873.

Between the date of the foreclosure decree and the receiver's taking possession, the company worked the road, and the question presented by the plaintiffs' bill in the cause now at bar is whether the earnings of the railroad in this interval should be held under the alleged *legal lien* of the telegraph company's judgment, or under the prior lien of the mortgage.

The mortgagees, immediately upon the telegraph company's issuing execution and serving garnishee process, and on the 21st June, 1873, filed their bill, and on the 27th June their amended bill, to assert, in equity, their right to have the earnings of the road applied on the mortgage debt, and to restrain the sequestration of such earnings under the telegraph company's subsequent and subordinate judgment.

The court below sustained the legal right of the subsequent judgment creditor to carry away the earnings of the railroad, *subsequent to the foreclosure decree, adjudicating the subordination of the judgment to the plaintiffs' mortgages, and administering the liquidation and distribution of the common debtor's whole property among all the lien-holders, according to priority.*

In advance of the direct consideration of the equities of the plaintiffs, under their mortgage and subsequent to their foreclosure decree, as against this judgment creditor, under his execution, it is well to define and understand these equities as between the plaintiffs and the railroad company (the mortagor to the plaintiffs and the judgment debtor).

There seems but little controversy on this preliminary relation. The growing income and earnings were, by words most comprehensive and explicit, made

a part of the subject mortgaged, and the right of the mortgagee, upon the mere condition of default in payment of interest, to subject the income and earnings to the satisfaction of the mortgage debt, was as clear as such right in respect to the body of the real and personal estate of the company. This was a clear and absolute right by the contract of the mortgage, and the only function of a court of equity, if the mortgagor resisted the execution of this right by the mortgagee taking possession, was to *execute* the right by its process, accomplishing the specific performance of the contract in this behalf. This clear *right* under such a railroad mortgage must not be confounded with an *equity* raised by a chancery court out of special circumstances and grafted upon a mere mortgage of the fee. Thus, in case of a mortgage of productive property conveying the fee, upon the concurring circumstances of insolvency of the mortgage debtor, and the insufficiency of the fee to satisfy the principal debt and the accumulating interest and costs, the court of chancery finds a ground for a *special equity* to lay hold of the rents in aid of the failing security of the fee. This equity springs into existence from these extraneous facts, and *dates from the judgment of the court thereon.* Necessarily, therefore, all competing liens antedating this judgment of the court, legal or equitable, must be respected and maintained in their priority. But when the *right* of the mortgagee springs from his contract, and dates from the default of the mortgagor for its actionable completeness, no competing lien will be respected by a court of equity, and upheld, which does not antedate the mortgagor's default in its asserted priority. If the competing lien be asserted by process of a common law court, the Court of Chancery appealed to for relief rescues the property from its sequestration, because the perfect equitable lien of the contract of the mortgage has rested on the property from the date of de-

fault in the debtor, and so the legal process has been anticipated by the equitable lien.

It is respectfully submitted that this proposition cannot be disputed, but a reference may be made to an authority in point.

Gal. & Ch. Un. R. R. Co. *vs.* Menzies, 26 Ill., 121.

"Where a corporation had given a mortgage or trust deed of all its property, tolls, income, franchises, &c., to secure the principal and accruing interest on its bonds, its revenues so pledged are not liable to a garnishee process by its judgment creditors after the execution by it of such mortgage or trust deed."—*Head note.*

See 1, 2, 3, 4, requests to charge, pp. 144–5.
Opinion of court, pp. 148–9.

"The defendant below, before this fund accrued, by its deed to Martin and Coman, had conveyed to them, to secure the payment of the principal and accruing interest on their bonds, all of its corporate property, tolls, incomes, issues, profits, rights, credits and franchises. Now this fund must, unquestionably, be an income of this road."

"Then, if the interest was not paid on these bonds as it fell due, and the evidence seemed to show that it was not, this fund was liable under the mortgage for its payment, and Martin and Coman have a right to recover and so appropriate it."

Again, it cannot be doubted that if the debtor recognized this equitable lien, and administered the income and earnings of the road in obedience to it, paying thereout the running expenses, and applying the surplus in the mortgage debt, the mortgagee has no occasion to disturb the possession of the mortgagor, by the interposition of a receivership, to accomplish the result. No doubt the mortgagee may, by want of vigilance, suffer the income and earnings

to slip away irrecoverably from his equitable lien, and by intervening through the powers of a court of equity, can only secure the proper application of the future income or earnings. Whether this will happen or not will depend wholly on the state of things when he intervenes. If he is in season to intercept the income and earnings before they have been collected or *expended*, as between himself and the debtor, he is in time. If the interference comes from a *creditor* of the mortgagor, the like rule applies. If the mortgagee intervenes in time to arrest, by equitable process, the diversion of the income and earnings from under his equitable lien, in point of fact his intervention is seasonable in point of law.

Now, as this bill was filed in a court of equity, against the railroad company and the judgment creditor in time to arrest the diversion of the income and earnings of the road from their subjection to the plaintiffs' equitable lien, what is the answer of the judgment creditor to the relief to which the plaintiffs are, upon the foregoing principles, plainly entitled? Is any defect in the plaintiffs' equitable lien *under the contract*, or in their title to enforce it by appropriate suit pointed out? By no means. Is there any pretense that the stage of their intervention is not seasonable, so as to arrest the attempted legal sequestration before the creditor has secured his money? On the contrary, the bill was filed immediately after the process of garnishment was served, and before a dollar was collected, or any adjudication charging a garnishee was made.

The stress of the argument against the plaintiffs' equity, and in support of the prevalence of the execution at law over it, rests upon the singular suggestion that the *judgment of foreclosure* has limited and superseded the plaintiffs' equitable lien, and given license to the operation of the judgment creditor's execution, which, but for this consequence of the actual judgment of foreclosure, it would not have had.

The reasoning upon which this proposition rests is wholly technical and artificial. It confessedly is without equity, and attempts an advantage from the course of the foreclosure suit which was uncontemplated and unnecessary, and is as surprising as it is unjust.

We have seen that, at any time after default in payment of interest, the plaintiffs could have taken possession of the road, and if the company had refused to yield it, might have commenced a foreclosure suit and had a receiver appointed. If such a suit had been commenced, and when the bill was to be filed it had been found that the telegraph company had levied and garnisheed, and the bill had raised *then* the litigation between the plaintiffs' equity and the judgment creditor's rights at law, of course, no ground for the *present* argument of the defendant would have existed. Could the plaintiffs' equity have been gainsaid on any ground? It is difficult to imagine any, and certainly neither the defendants' brief nor the opinion of Judge Dillon exhibits any ground for it. The circumstances then and thus presented would have shown the very need and occasion for the courts being appealed to to maintain the appropriation which the mortgage had made of the income and earnings. This need and occasion would have been that a *junior* judgment creditor was attempting to subtract, by legal process, from the operation of the mortgage, a part of the *res* mortgaged, and apply it on the judgment which was subordinate to the mortgage. As the telegraph company recovered its judgment in *May*, 1872, and the foreclosure suit was not commenced till *July*, it is very plain that any attempt *then* to overreach the mortgage lien in favor of the junior judgment was felt to be hopeless.

The mortgagees, then, received the due application of the net earnings all through the course of the foreclosure suit and had no occasion to ask for a receiver as against the railroad company, and the telegraph

company gave no occasion to ask the protection of the court against it. Now, what has happened changing the rights of the plaintiffs or affecting the time or mode of their assertion of those rights by reason of the foreclosure suit having come to a decree? Nothing but this. The telegraph company attempted to seize the revenues of the railroad company *after* the decree in foreclosure. The plaintiffs, thereupon, invoked the equity powers of the U. S. Circuit Court (whose legal process was being inequitably used), by the present suit. An ordinary injunction suit in equity to stay proceedings at law was commenced when the inequitable proceedings at law were taken.

It is respectfully submitted that no reason can be given which should prevent this court from administering the same equity in this actual suit, which it must have administered had the inequitable proceedings at law been taken *before* or *during* the foreclosure suit. A reason has, however, been attempted and though it has been fully refuted in our opening brief, and the learned judge below gave no countenance to it in his decision, I cannot omit a brief examination of it.

It is said that the principle that a simple contract upon which a judgment at law has been recovered is merged in that judgment, and no subsequent action can be maintained upon it, applies to this case. That the judgment in foreclosure is the measure of the plaintiffs' relief in the premises, that the *equities of the mortgage*, which could have been exerted in restraint of the inequitable use of the legal powers of the Circuit Court, are merged in the decree, and that, in the interval between the entry of that decree and the sale under it, this judgment creditor can do the very thing it could not do, to the prejudice of these plaintiffs, if no decree had been had.

The pretension that, because a contract cannot be sued again at law after judgment is once had on it, therefore a *lien* of a mortgage (which it is the whole function of a foreclosure suit *specifically* to enforce) is

lost, when an extraneous and subsequent interference with the lien is attempted, rests upon a confusion of subjects governed by entirely distinct and independent reasons.

In the case of a judgment at law upon a contract, the contract is exhausted as a subject of litigation, and is no longer capable of suit. For this reason it is said to be *merged* or swallowed up in the judgment.

In the case at bar the lien of the mortgage and its continuance up to the *sale* of the mortgaged premises is the very life and support of the decree up to its final execution by such sale. As to this judgment creditor the lien of its *judgment* upon the mortgaged premises, and every part thereof, had been adjudicated in this decree, its subordination to the plaintiffs' lien established, and the possibility of interference with, or disparagement of, the plaintiffs' lien by or through that *judgment*, precluded.

But, subsequent to the decree in foreclosure, process on this *judgment* against income of the mortgaged premises, to accrue between the decree and its execution, issues, on the ground that the income, during this interval *is not covered by the decree, and the subordination of the judgment to the mortgage in this behalf has not been adjudicated.* In other words, that the execution raises a *new lien* upon a *new subject.*

It is respectfully submitted that the decree in foreclosure is no bar to a suit to restrain an inequitable interference with the income of the road, first threatened after the decree, and in respect of income arising thereafter. The injunction suit is ancillary to the objects of the principal suit, and to suppress an inequitable subtraction of a portion of the mortgaged property from the equitable lien of the mortgagee.

If any circumstance were wanting to exhibit the falsity of reasoning and the injustice in result by supporting this garnishee process, it is supplied by the evidence in the principle cause, that the fund sought to be applied in satisfaction of the judgment comes

from earnings, for the most part, accruing *after* this injunction bill was filed by the plaintiffs. In effect, an *equitable* execution is given by the Circuit Court to the judgment creditor to sequestrate income confessedly covered by the prior express lien of the plaintiffs' mortgage, *after* suit begun to enforce the lien of the latter.

Record, fols. 238–45.
Bridgeman's Evidence.

The decree in the principal cause should be reversed and the injunction prayed for by the plaintiffs' bill made perpetual.

THE SUIT AT LAW, NO. 558.

In regard to the criticisms upon the *Record* in this case, and the opening brief applicable thereto, in point of form, they seem to have arisen from a misconception. The record itself shows the determination of the court to have passed upon the legal question presented upon the answer of the garnishee, and the writ of error brings up that question.

If the views we have presented on the argument of the principal cause (the injunction suit) obtain, as we confidently expect, the sanction of this court, and the decree in that suit is reversed, and an injunction as prayed for in *that* suit is made perpetual, the collection from the garnishees, including Coykendall, the plaintiff in error in *this* cause, will be restrained in equity, however good and effectual the garnishee's process may have been upon merely legal reasons. It is not necessary to repeat here the argument made in the principal cause.

The only further question for consideration here, is whether *error* has been committed in the actual judgment of the court below, reviewable on this writ of error

I.—It appears, conclusively, that the plaintiff moved for and obtained a judgment against the garnishee

upon the answer and amended answer of the garnishee, and without any further proof on the plaintiffs' part.

Plaintiffs' motion for judgment, Record, fol. 22.

Judgment, Record, fol. 25–27.

If upon that answer the judgment was erroneous, the writ of error brings up the error in the judgment for review, no aid from any bill of exceptions is necessary.

II.—Upon the answer it appears that the garnishee, as ticket and freight agent for the Des Moines R. R. Co. (the judgment debtor), collected $27,000 within a certain period of time for freight and passage money earned by and belonging to the Des Moines R. R Co., *and* for freight and passage money earned by, and belonging to, other connecting railroad lines.

The garnishee, in his subordinate agency, accounted for and paid this money to his superior, the treasurer of the Des Moines R. R. Co., and the division was then made between what belonged to the Des Moines R. R. Co. and the connecting lines, and the latter's share paid over to them.

It appears further, by the garnishee's *original* answer, that the sum of $12,000 would represent the amount belonging to the Des Moines R. R. Co. out of the total of $27,000; the plaintiffs, on *this* answer, moved for judgment only for this sum of $12,000.

Original Answer, Record, fol. 29.

Motion for Judgment, Record, fol. 20.

If, then, upon the answers, judgment for $27,000 is erroneous, it must be set aside, and a new trial ordered, irrespective of the more general questions which have been discussed in the principal cause.

III.—The ticket agent, the garnishee, is not properly a *debtor* of the Des Moines R. R. Company for the money collected belonging to it, or to the connected lines. It is money in his hands for which he is to account *as the money of others.* If, while it remains in his hands, diligently and faithfully guarded, it is destroyed by fire, or he is robbed by force, it is the loss of the owner and not of him. He could not be sued as a debtor without proof of his appropriation of his employer's money, or proof of demand and refusal, which is equivalent to appropriation, if unjustifiable.

So far, then, as money earned by, and belonging to, the Des Moines R. R. Co. is concerned, Coykendall is subject to garnishment only as the holder of funds, not as the ~~principal~~ debtor of the Des Moines R. R. Co.

In respect of the moneys collected by Coykendall, as earned by and belonging to other railroad companies, his agency required payment to the treasurer of the Des Moines Company, for distribution to its owners. But, while in Coykendall's hands (and equally after it came into the hands of his superior officers), the nature of the relation of *holder of funds*, and not a debtor, was not changed, and the plaintiffs' difficulty was and is, that these latter funds were not the funds of the Des Moines Co., but were collected by it and its agents only as an agent.

The funds after they were in the hands of the treasurer of the Des Moines Company, would be subject to garnishments by a creditor of the railroad company to which they belonged, and for which the Des Moines Co. held them. This tests the relation and shows that the portion of the $27,000 for which judgment was given against the garnishee, which was collections for *other* railroad companies was erroneously included.

The case is not different from that of an agent for various estates, employing a sub-agent to collect from tenants of each estate and bring the collections to him for an accountable distribution. Certainly a creditor of the superior agent could not *garnishee* the

rents in the hands of the sub-agent. It is not less clear that a creditor of the owner of *one* of the estates, could not *garnishee* the collector of rents, or the superior agent, for the rents coming from *other* estates.

Now, the burden of proof was on the plaintiff below to show, *affirmatively and distinctly*, the share of the moneys in the hands of the garnishee which were the earnings of and belonged to the Des Moines Company, and to limit the judgment to that sum. But the court held the sub-agent subject to garnishment, no matter what road the money belonged to, *because* this sub-agent was a common collector and the distribution was made by the superior agent for the Des Moines Co. to the other companies.

A court of law is thus made the means of compelling the Des Moines Company to practice the iniquity of applying its collections for others to pay its own debts. The garnishee process is a beneficial one, and in the nature of equitable execution. It is administrable *ex æquo et bono*, and becomes a mere oppression when it is made the means of overriding the rights of third parties.

Conceding, then, for the purpose of the present point, that judgment might have been lawfully given against the garnishee upon a judicial ascertainment of the earnings of the Des Moines R. R. Co., in the ticket agent's hands, it was manifest error to give judgment for the total collections, irrespective of such ownership and without such judicial ascertainment.

Upon the grounds presented in the opening brief, and those herein, again insisted on, we respectfully submit the judgment should be reversed, and a new trial ordered.

WM. M. EVARTS,
Of Counsel for Appellants, and
of Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. 557.—*Appeal from the Circuit Court of the United States for the District of Iowa.*

W. S. GILMAN, N. A. COWDRY, LUTHER C. CLARK AND HENRY C. BARLING, Appellants,

vs.

THE ILLINOIS & MISSISSIPPI TELEGRAPH COMPANY, THE DES MOINES VALLEY RAILROAD COMPANY, AND OTHERS,

In Equity.

No. 558.—*In error to Circuit Court of United States for the District of Iowa.*

H. COYKENDALL, GARNISHEE, Plaintiff in Error,

vs.

THE ILLINOIS & MISSISSIPPI TELEGRAPH COMPANY.

At Law.

STATEMENT OF CASE AND ARGUMENT FOR THE ILLINOIS & MISSISSIPPI TELEGRAPH CO.

The above entitled causes are, by consent of counsel, to be submitted together: not that the determination in one cause will necessarily dispose of the other, but because of the facts out of which they arose; for, while they grew out of the same transactions, to some extent, it may well be that the fate of one will have no influence on the destiny of the other. Regarding the matter in this light, and controverting in part the statement of the cases made by appellant, we proceed to make, first, a

STATEMENT OF THE CASE OF

W. S. Gilman and others, Appellants,
vs.
The Illinois & Mississippi Telegraph Co.

In the year 1857, the Keokuk, Fort Des Moines & Minnesota Railroad Company executed to certain trustees a mortgage—and in the year 1868, (having in the meantime changed its name so as to be known and called the Des Moines Valley Railroad Company,) it executed to other trustees another mortgage, to secure its bonds.

These mortgages were in the usual form, and conveyed the road, with its appurtenances — and the franchises of the company — together with all "rents, issues, incomes, tolls and profits," etc.

The principal of the bonds secured by the first mortgage was to become due in 1877. That of the bonds secured by the second mortgage, in the year 1898. Each set of bonds bore interest, payable semi-annually. Default in payment of interest or principal authorized the trustees to take possession and "collect and receive all tolls, freight, incomes, rents, issues and profits," and apply them upon the debt secured by the mortgages, and, upon request of one-third of the bondholders, to sell the railroad and property mortgaged.

The trustees never took possession of the road. They never demanded possession of it. But in *July*, 1872, on the alleged ground of default in payment of interest, the trustees in the second mortgage commenced suit in the Circuit Court of the State of Iowa in and for Polk county, to foreclose their mortgage, making the railroad company, the trustees in the first mortgage, and various judgment and lien creditors of the railroad company parties defendant, and, among others, the Illinois & Mississippi Telegraph Company.

No receiver was applied for pending the foreclosure proceedings, nor at any time, by the complainants.

On May 31st, 1873, the foreclosure case came on for hearing before the Polk County Circuit Court, and a final decree was rendered foreclosing the said mortgage, and directing a sale of the entire railroad by the sheriff of Polk county, on a special execution, to be issued, unless the amounts found due were paid within ten days.

The decree, as originally entered, made no provision as to the possession or earnings of the road between the date of such decree and the sale thereby ordered.

The decree thus rendered on the 31st of May, was read in open court, assented to and signed by the court, and ordered to be entered of record against objections thereto made by the the defendant, the Illinois & Mississippi Telegraph Company, and a bill of exceptions was allowed and signed by the court.—*Printed Record, p.* 51.

The said bill of exceptions is referred to, to show that the decree rendered on the 31st of May was, and was understood to be, by the court and all the parties, a *final* decree.

The decree fixed the priorities of the several parties, holding that the lien of the telegraph company's judgment, rendered in the Circuit Court for the District of Iowa, May 21st, 1872,

for the sum of $25,185.76, was subject to that of the mortgage in suit, and other liens.

The decree was entered of record, the record signed by the court, and the court adjourned.

On the same day, to-wit, May 31st, 1872, notices of appeal from the decree were filed, service thereof having been accepted by the clerk of the court and by the attorney of plaintiffs in the foreclosure suit. The appeals were never perfected, and have been abandoned.

Thereafter, to-wit: on the 13th day of June, 1873, the respondent, the Illinois and Mississippi Telegraph Company, caused an execution to be issued from the U. S. Circuit Court upon its judgment against the railroad company, and garnished under the statute of the State, moneys in the hands of the agents of the railroad company at various stations, received by them from the income and earnings of the road.

The object and intent of the garnishment was to have so much of the earnings of the road, between the date of the decree, and the time when the purchaser, at the sale ordered thereby would be entitled to the possession of the road, as might be necessary, applied to the payment of the telegraph company's judgment.

The decree had made no disposition of the earnings of the road. No application had been made for the appointment of a receiver. The railroad company had been left in the possession of the road, and was operating it for its own benefit. The petition on which the decree of foreclosure was asked and granted, contained no allegation that the security was insufficient, and that the railroad company was insolvent, and did not ask for the appointment of a receiver, nor was there any proof offered on the subject.

After the execution had been issued and the agents of the railroad company garnished, the complainants in this case

filed their bill in equity to enjoin the proceedings by the telegraph company upon the execution under its judgment.

The bill was afterward amended so as to make the Des Moines Valley Railroad Company a defendant, and a temporary injunction was allowed as prayed.

On September 9th, 1873, after a sale had been advertised by the sheriff, application was informally made, without any petition for rehearing or bill of review, to the Polk County Court, by the *trustees under the first* mortgage, for a modification of the decree of May 31, 1873, and the same was modified in several important particulars, and among other additions to the decree was one appointing a special receiver of all the income and earnings of the road, between the date of the amended decree or sheriff's first publication of notice of sale under such decree and the sale to be made by him. This was done, saving the rights of the telegraph company.

The execution which had been issued under the original decree before it was amended, was set aside; the sale advertised abandoned, and a new execution directing a sale to correspond with the amended decree, was issued, and a sale made thereunder October 17th, 1873.

The special receiver took possession September 15th, 1873.

Between the date of the decree of May 31st, 1873, and September 15th, 1873, when the special receiver took possession, the road was operated by the railroad company, and during this period the net earnings, after paying operating expenses, were $27,147.96, (see deposition of A. Bridgman, p 49, record.)

This sum, it is claimed by the Illinois and Mississippi telegraph company, belonged to the Des Moines Valley railroad company, and could be applied to the payment of its debts, and was subject to attachment, the same as the property of an individual.

The cause was submitted to the court below upon bill, answer, replication, the deposition of Arthur Bridgman, the papers specially referred to in stipulation on page 53 printed record, and in addition thereto, any and all of the files, papers, records and proceedings in the cause of W S Gilman, et al. trustees, vs Des Moines Valley railroad and others, tried and determined in circuit court of Iowa, in and for Polk County, up to, and including the executions issued in said cause and returns thereon. See same stipulation and also stipulation on p 68, record.

And upon *all this testimony*, (for the cause was submitted on printed arguments in the courts below, and, with the printed arguments were forwarded to the court in vacation, the whole record in the case of Gilman and others vs Des Moines Valley railroad and others, as well as the testimony found in the printed record), the court rendered a decree upon the merits of the case, dismissing complainant's bill.

See statement of the case, and opinion of the court, on pp. 68, 69, 70, 71, of record.

From this decree the complainants prayed an appeal, which was allowed, and the case is now before this court for disposition.

The statement of the cause in complainants' brief, is incorrect in that it avers that the original bill for foreclosure asked the appointment of a receiver, which is not true.

It does not comply with Rule 21, in that it does not present "succinctly the questions involved, and the manner in which they are raised."

The main question in this case on the merits is: "who is entitled to the net income of the Des Moines Valley railroad company, between the date of the original decree in the foreclosure case in the State Court, and the appointment of a

special receiver?" and the question arose in the following manner:

The complainants in this suit were the complainants in the foreclosure suit in the State Court.

They had obtained a decree in which their mortgage had been foreclosod, and their rights under it established.

They had not taken possession of the railroad, nor asked for possession of it. They had not asked for any relief in regard to the earnings of the road, but had left the railroad company in undisturbed and unquestioned possession of the road, and the said company was operating the road entirely through its own officers and for its own benefit. No receiver had been asked for or appointed, and the facts necessary to the appointment of a receiver were not shown to exist by any averment or by any proof.

The Illinois and Mississippi telegraph company had a judgment against the railroad company. Execution was issued, and the net earnings of the road between the date of the original decree of foreclosure and the appointment of a receiver, were attached by garnishment.

The complainants claimed said earnings under and by virtue of their mortgage,--and the respondent claimed them under their garnishment of the agents of the railroad company.

The court below decided that the respondent, the Illinois & Mississippi Telegraph company, was entitled to the earnings, and we have no doubt of the correctness of the decision.

It is the duty of the appellant to show wherein the decision is wrong, and to this end, to make an assignment of errors in accordance with rule 21.

No assignment of errors has been made, and questions will neccessarily arise, in this court, which did not and could not arise in the court below, and to them we will first call attention

ARGUMENT.

I. The brief and points presented by appellant ought not to be considered by the court, because the brief does not in any sense comply with the requirements of rule 21.

It does not present succinctly the questions involved, and the manner in which they are raised.

Neither does it contain any assignment of errors, as required by subdivision 2 of Sec. 4, and the points made by appellants must be disregarded, or the the cause dissmissed. (See sections 8 and 9, rule 21.)

But if the court should be of opinion that appellant's brief does comply with the rule; if it does state clearly the questions involved, and the manner in which they are raised; if it does contain an assignment of errors as required; if it does state as specifically as may be, in what the decree is alleged to be erroneous, and if these statements are made in the order required, then we say,—

II. That the decree rendered by the court below must be affirmed, because *all the evidence in the case* is not before this court, and there is no process by which it can be reached and brought here.

On page 53 of Record it is stipulated that certain "documents shall be admitted and received in evidence upon the trial of this cause, as if the originals thereof had been produced ane proved in the regular form. * * * * * "Copy of mortgage, dated October 1, 1868, made by Desmoines Valley Railroad company to W. S. Gilman and N. A. Cowdry; copy of decrees, original and amended, in the case of W. S. Gilman and others, trustees, vs. Desmoines Valley Railroad company and others, rendered in the circuit court of Iowa, in and for the county of Polk."

"Copy of petition in said cause, and any amendments there to; *and also*,

Any of the files, papers, or any of the records and proceedings in said cause, up to and including the executions and returns thereon issued in said cause,—and either the originals or copies may be used."

This stipulation is dated April 27, 1874. Afterwards, in August of the same year is filed the following: (the object of which clearly was, to have all the papers in the foreclosure case considered in evidence without going through the form of offering each one, or of keeping a record of such as were offered,—so that any paper desired by the court, or either party might be used in the case.)

Page 68 of Record: "Under the stipulation as to evidence, to be found in this package, either party has a right to have in evidence any or all of the papers, files and entries in the foreclosure case, some of which, or copies thereof are contained in this package. To save all question, *all of the papers covered by the stipulation* are to be considered in evidence, and if any not among the papers in this case are desired by the court or either party in the further progress of the case they may be furnished or filed in the case."

Under these stipulations, Messrs Gatch & Wright forwarded to the attorneys of the the Illinois & Mississippi Telegraph company, copies of their argument—together with the papers in this case, and all of the original papers,—including the original and amended decrees in the foreclosure suit, to be used by them in preparing their answer to the argument of Messrs Gatch & Wright. And when the arguments were completed, the same original papers which had been used by the attorneys were forwarded to the Judge of the Circuit Court, as evidence in the cause, to be used to such extent as the court might

no record kept of it—no statement of the Judge in regard to it—so that it could be introduced into the record. The cause which was tried in the circuit court is not here for trial. Appellants have undertaken to bring it here, and have not succeeded. And because it is not shown affirmatively that all the evidence is in the record, the decree must be affirmed. We refer to the case of *Britten et. al. vs. Central R. R. et. al.*, 39 Iowa, 390, as being precisely in point.

III. The first point made by appellants is "that the railroad company had legal capacity to and did mortgage its future earnings."

It is not questioned that it undertook to do so, and we do not find it necessary to question that such a mortgage might have been made and might have been effective. But when the first mortgage was given, there was no law in this State authorizing railroad companies to execute such mortgages. It has been held, however, that upon general principles such mortgages may be given, and in this State it is held that corporations for pecuniary profit—railroad companies—have the same powers in this respect that individuals have. That they have the same privileges and the same liabilities, except as provided in the act authorizing their creation, that individuals would have and no other.

It does not appear, however, that either of said mortgages were ever recorded at all, and certain it is that they were never recorded as *chattel* mortgages. The law making the record of such a mortgage as a real estate mortgage sufficient, was passed March 31st, 1858. Revision of 1860, p. 222 223. This law is not retroactive. It is not curative. It professes merely to confer powers upon railorads not before possessed by them. And the fact that it makes a mortgage of personal property when recorded among real estate mortgages, sufficient notice

as to the personal property is sufficient of itself, to show that prior to the passage of such law, the mortgage would not be notice as to the personal property, unless recorded among chattel mortgages.

By Ch. 93 of Revision of 1860, p. 388-9, such mortgages are not valid unless recorded as therein provided, and such mortgage is not complete as to third persons until filed with recorder and proper entries made. Section 2203 Revision.

And the same point has been decided in New York.

Murdock vs. Gifford, 18 N. Y. 28.

Hoyle et. al. vs. P. & M. R. R. 54 N. Y. 314.

We say then, that the mortgages were not valid as to third parties so far as they covered the earnings of the road, because not recorded as chattel mortgages.

Second. The second point maintained by appellants is:

That the company having power to mortgage its earnings—such earnings when so mortgaged became as much part of the bondholder's security as the road bed, &c.

Let this proposition be admitted and what follows:

There were two kinds of property included in the mortgage foreclosed, namely, real property and personal property.

Among the personal property was included the earnings or rents and profits of the road.

By the general laws of Iowa, it is provided that in the absence of stipulations to the contrary the mortgagor of real estate retains the legal title and right of possession thereof.

The legal title and right to possession thereof of any productive real estate and particularly of a railroad, which remains with the judgment debtor, until the time of redemption be passed, is an interest of value; is such an estate as may be

the subject of a lien or of a sale under execution or of a conveyance by deed of the debtor.

Curtis vs. Millard & Co., 14 Iowa, 128.

This interest is not covered by any general mortgage. It can only be parted with by special contract—by "*stipulations to the contrary*," It rests entirely upon the stipulations of the parties. And if these stipulations say that under certain circumstances this right shall be surrendered—and that the surrender shall be asserted in a particular form or way—surely that form must be followed, and the right or forfeiture cannot be asserted in any other form without an attempt being made to assert it in the form provided. And until the claim is made for the possession of the road, and thereby for the receipt of the rents and profits, they, the rents and profits, as well as the possession of the road belong rightfully and legally to the mortgagor, subject to execution, to lien, to sale.

Curtis vs. Millard & Co., 14 Iowa, 128.

The appellants say in their argument, p. 6, that under the law of Iowa, "it is questionable whether an order appointing a receiver to take possession of the road could have been made. * * * And that no such order would or should have been made without some showing that it was necessary for the protection and proper application of the earnings, &c."

Now we agree with appellants in this respect: Only we go a step further, and say that, until the mortagees had demanded possession as they might have done under their mortgage, and had after such demand made the necessary averments in their petition, they were not entitled to the earnings of the road, and could not have a receiver appointed to collect and apply them; and that so long as the railroad company, was in possession of the road, and in receipt of the earnings, the said earnings were the property of the said road, and could be applied by it

to the payment of its debts, and the appellants, in this case the mortagees, could not question such action on the part of the railroad company.

Although the argument of appellants is divided into five divisions each division has so much in common with all the others, that it is difficult to tell where one division ends and another commences, and is impossible to be answered as divided without needless repetition. The burden, through all the divisions is much the same, and the only distinct propositions we find are about as follows:

That the earnings of the road were included in the mortgages, and can be claimed only by the mortgagees.

That it matters not whether mortgagees had a receiver appointed or not, or whether they demanded possession of the road.

That if, in any manner they could have secured the application of the earnings of the road toward the payment of their mortgages, it is impossible for them to lose them by any failure to do anything on their part.

That a mortgage can never become merged or extinguished

That if it could, still the mortgages in this case would be kept alive for their benefit.

That if the mortgage is merged by the foreclosure, it is true only to the extent that they have sought to subject the mortgaged property to the payment of the mortgage debt, and that they can by some supplemental or other proceeding subject the earnings to their demand.

That if neccessary the court will, in order to give them the earnings, treat the amendment or modification of the decree,

whereby a receiver was appointed, on the 9th of September, 1874, as a *nunc pro tunc* order, and say the appellants were entitled to and will be considered as having a receiver from the beginning.

That this suit is a demand for the possession of the road.

We will notice these propositions and such others as it may seem neccessary to notice, but shall do so generally.

The earnings of the road were included in the mortgages, and if the appellants had claimed them in a proper manner, and at a proper time, they doubtless could have secured them. But unless they claimed them, or demanded them in a legal manner, they certainly not only might lose them, but have lost them; and if there has been a final decree, foreclosing the mortgages they are merged or extinguished.

The appellants' mortgages have been foreclosed—what purports to be the decree is set forth in the record, (see p. 58 of record). But the decree set forth is neither the original nor the amended decree in that cause.

It does not purport to be either the one or the other.

It is a copy of a part of the original decree, entered May 31st, 1873, with the proposed alterations and amendments.

The proposed alterations or amendments are said to be in italics or in "[ ]" brackets we suppose.

The amendments proposed were not all adopted — as proposed — that is, one or more of them were modified.

The original amended decrees were in evidence in the Circuit Court. The decree set out in the record, will, perhaps, answer all practical purposes if the court in consulting it will bear in mind that there was no word or sentence in the original decree in *italics*, nor was any part of the original decree in "[ ]." Strike from this decree in the record all the words

and sentences in *italics* or in brackets, and you have substantially the original decree.

It is agreed on all hands that there was a decree of foreclosure; and one of the questions in the case is, as to the effect of a decree foreclosing a mortgage.

Does it merge or extinguish the mortgage?

Now while it will not be contended that a mere change of the debt secured by a mortgage — as for instance a renewal thereof,— or even a judgment at law upon a note or bond which is secured by mortgage, will extinguish the mortgage unless so intended, yet when an action is brought upon a *bond and mortgage*, setting forth the bond to show the indebtedness, and the mortgage to show the security, averring that by reason of certain facts, a bond not due by its terms for twenty years has, in equity become due, and that by reason of certain provisions in the mortgage, the complainants have a right to enforce the provisions of the mortgage, and have the mortgaged property sold for the payment of their debt, then, we say, the action or proceeding is founded as much upon the *mortgage* as upon the *bond*, and if by the decree the bonds are merged or extinguished, then the mortgage is also. The action or proceeding to foreclose being in equity, is founded mainly, if not entirely, upon the mortgage, for without the mortgage equity would have no jurisdiction of the case.

In the proceeding to foreclose their mortgage the complainants asked for such relief as they thought they were entitled to, and when, upon a hearing of the cause, a final decree was rendered — such decree, thereafter, became the evidence, and the measure of their rights.

They are entitled to what that gives them and nothing more.

What they might have claimed in the foreclosure of the mortgage, is not the measure of what they may claim here.

The mortgage is extinguished or merged by the decree foreclosing the same and ordering a sale of the mortgaged property, and the evidence that the mortgage once existed, and of its provisions are to be looked for in the decree.

It is the decree, and not the mortgage, which is now the evidence of a lien upon the property of the Des Moines Valley Railroad, and if by the *decree itself*, a lien is not fixed upon the earnings of the road, between the date of the decree, and the time when the purchaser thereunder would be entitled to the possession of the road, there is no such lien; and this court cannot do for the complainants what the State Court refused or failed to do, in adjudicating their rights under their mortgage.

In the petition which was filed in the Polk County Circuit Court, to foreclose complainants mortgage, there were no allegations made showing the propriety or the necessity of appointing a receiver.

On the trial there were no proofs offered showing, or tending to show, such propriety or necessity.

The mortgagor, the Des Moines Valley Railroad, was left in unquestioned, unconditional possession of the road. By the law of this State the mortgagor has the legal title, the right to the possession, and to the rents and profits, not only between the time of the decree and the sale thereunder, but until the right to redeem has expired by limitation, unless a contract has been made to the contrary. And when, by the mortgage, the mortgagee has the right of possession, and the right to the rents and profits, in order to obtain them he must *pursue the course pointed out in the contract by virtue of which he claims such right* — or attempt to do so — by making a proper demand, before he can claim, even against the mortgagor, the possession or the rents and profits.

If, by stipulation, the mortgagee is entitled to the possession and to the rents and profits, and if upon proper demand they be refused them, by making the requisite allegations and proofs he may have a receiver appointed.

If, in such case, it be alleged and proved that a demand for possession has been made and refused; that the security is insufficient; that the defendant is insolvent, and that it is necessary to have a receiver appointed to collect and apply the rents and profits, a receiver will be appointed, and not otherwise.

But if the mortgagor be left in the unconditional possession of the property, he is entitled to the rents and profits. They are his, and the mortgagee cannot recover them from him — and any creditor of the mortgagor may levy upon them.

In this case the mortgagor was left in the possession of the property, and was left in the receipt of the earnings of the road, and could apply them in payment of its debts.

The whole subject of the rights of a judgment debtor is discussed, and his *status* in relation to the property levied upon and sold under execution clearly stated, in the case of *Curtis* v. *Millard & Co.*, 14 Iowa, 128.

In that case the court says: "Under our statute, the legal estate of a judgment debtor is not divested by a sale of his land under execution, until after the expiration of the time for redemption, and the title has vested in the purchaser by deed from the sheriff. Prior to the delivery of such deed, the legal estate, the possession, and the usufruct, all remain with the execution debtor, and is an interest of value, or such an estate as may be the subject of a lien, or of a sale under execution, or of a conveyance by deed of the debtor," etc.

The rule is the same whether the execution be general or special. When a final decree is rendered, foreclosing a mort-

gage, and ordering a sale upon special execution, if the decree itself does not find and declare rights which cannot be enforced by execution, and provide the machinery for enforcing such rights, the execution plaintiff is entitled only to his execution, and to the relief which may be enforced thereby.

The decree is final and conclusive. The object, the office of the decree is to ascertain and declare in a solemn form, the extent of the rights of the complainant, and to provide the means of enforcing them.

The debt is the principal thing. The mortgage is a security merely. Whatever merges and satisfies the debt merges and satisfies the security also. Whatever bars the debt bars the security. This is especially the case in this State, where it has been decided that if the debt is barred by the statute of limitations, the mortgage is barred also. That a mortgage is *not an estate*, and that a creditor cannot pursue his remedy upon the mortgage when the debt is barred by the statute of limitations, as he may in many of the States. See the case of *Newman* v. *DeLorimer*, 19 Iowa, 214.

The confusion which seems to exist on this subject may perhaps be satisfactorily accounted for by the fact that formerly—and even now in many of the States — a mortgage was an estate. That the mortgagee could maintain ejectment after default, and get possession of the land, and of the rents and profits. That a mortgage was an interest in the land which could not be barred short of the period allowed for bringing a real action, etc.

But here a mortgage is simply a security. It follows the fate of the principal, and is dependent upon it entirely for vitality.

The mortgage follows the fate of the debt as certainly and surely when the debt is merged in a decree founded upon the

mortgage, as it does when the debt is barred by the statute of limitations.

A mortgage being nothing more than a security for a debt. Why should it be exalted above the debt itself? Why should it, in addition to the natural advantages it gives to a creditor over some other forms of security, be loaded with artificial advantages, and have qualities thrust upon it which do not pertain to it, and for which there is no foundation in authority or reason?

It is a *lien*. Why do not the same qualities of mortality, disease and death, and liability to failure, attach to it which attach to all other human contrivances, to all other liens?

Where is the reason, where the authority, upon which its invulnerability is predicated?

Other liens may be lost, and why not a mortgage lien?

Attachment liens may be lost;

Execution liens may be lost;

Judgment liens may be lost;

Vendors' liens may be lost;

Mechanics' liens may be lost;

Personal security may be lost.

These all require certain positive acts to sustain them, under certain circumstances, and if they are forgotten, overlooked, neglected, not furnished with vital air, they perish — and so with the lien of a mortgage.

It would require too much space to give instances and illus, trations of the manner in which the various kinds of securities and liens may be lost. They will readily occur to the court. But there is one so much in point as showing how readily an oversight, or a little neglect, may cause the loss of a security or lien, that we cannot forbear referring to it.

In the case of *Bertram* v. *Waterman*, 18 Iowa, 529, the plaintiff, having a judgment which was a lien upon real estate, but

upon which execution could not issue without reviving the judgment, filed a petition to revive the judgment. The plaintiff was entitled to what he asked for, and judgment was ordered accordingly. A judgment was entered in form for the amount due, with interest and cost, instead of an order for execution on the judgment sought to be revived. *It was held:* That this was a merger of the first judgment; an extinguishment of the lien under the original judgment; that the plaintiff had such lien only as the last judgment gave him, and that a deed given by the debtor after the date of the first judgment, and before the date of the last judgment, passed the title to the real estate free from any judgment lien. Now here a lien or security was lost by the action of the plaintiff, by a little oversight in a proceeding which was intended to give and secure to him the benefit of his lien.

So in the case at bar. The appellants had a lien by virtue of their mortgage: they instituted a proceeding to have the right given them by their mortgage established. They had failed to take or demand possession of the railroad, and therefore could not and did not make the necessary averments in their petition to have a receiver appointed—and for lack of these things—and for lack of any proof upon the trial, they failed to obtain the relief which they might have demanded if they had made the requisite allegations and proofs.

They obtained such a decree as they were entitled to upon the case made by them, and an order for the enforcement of the terms of the mortgage to the extent authorized by the pleadings and proofs,—and their mortgage became and was merged in the decree, and, as against the legal rights of the Illinois & Mississippi Telegraph company which attached and were fully vested by the levy of its execution—they cannot be heard, when they come here, to say that their original lien

was larger or more extensive than that given them by their decree—that their mortgage is not merged, and that this court will give them what they failed to obtain in the adjudication of their rights by the Circuit Court of Polk county.

Stripped of its indefinite qualities, as a mortgage is by the laws of this State, and placed upon a par with all other written contracts upon which action must be brought within a given time, and with all other securities which may be lost by the action of the parties, and by judicial proceedings; by acts of commission and acts of omission; by negligence, by oversight, by mistake, there is no pretense to say that it has life and vitality after its foreclosure, and that it is not merged in a judgment and decree thereon, in the same manner and to the same extent that any other contract would be merged.

Merger is where a greater and a less thing meet, and the latter loses its separate existence, and sinks into the former. Thus, if a verbal contract be reduced to writing, the verbal is merged in the written contract.

If a judgment be obtained upon a contract, the contract is merged in the judgment. If a mortgage be foreclosed, the mortgage is merged in the decree of foreclosure. And, as a party cannot go behind the written contract to show what the verbal contract was, nor behind the judgment to show that it is erroneous; so he cannot go behind the decree of foreclosure to show that he is entitled to other or different relief than that given by the decree.

As, in the case of *Goodrich et al* v. *Dunbar*, 17 Barb. 644, where a plaintiff sought to go behind a judgment to show upon what it was founded, and that, being founded on certain considerations, he was *therefore* entitled to some specific relief; he was told that the only rights he now had, must arise out of or be founded upon the judgment. "That he chose to sue the

defendant. He, defendant, did not compel him to bring his action or to take judgment against him. You have all the advantages of the judgment, and should take it with such inconveniences as neccessarily attach to it. The defendant might, perhaps, if the whole case were open to him, show that the items before disallowed to him should be allowed, and if he were to succeed in this, he would nearly discharge the plaintiff's claim. But he is precluded from doing this on account of the high character of the evidence contained in the record of the judgment, and its merger of the original contract; and he should therefore be protected from having that judgment regarded as unimportant."

So, we say to these appellants: You made no claim to the rents and profits; you did not take the steps which alone would entitle you to receive them. You did not take nor demand possession of the road—the only mode pointed out in your contract, whereby the rents and profits were to be made available to you. You did not ask for the appointment of a receiver; you did not prove any fact showing the neccessity or propriety of appointing a receiver.

You left the mortgagor in the unconditional possession of the road—and in the receipt of its earnings. You asked and obtained judgment for the whole amount of your bonds and interest up to the time of the decree, and it was ordered that such amount be paid to you with interest upon the *whole sum*, (*here your decree commenced and your bonds and mortgage — being merged—ceased, to bear interest*) up to the time when the same should be paid.

By your judgment and decree you were authorized to sell the railroad, and apply the proceeds to the payment of your claim; and you are authorized to do this, not by virtue of your mortgage, but by virtue of your decree. You have all

the advantages of your decree, and you must take it with such inconveniences as neccessarily attach to it.

If the decree does not establish your rights and bind you, then it does not bind the respondents. It is mutually binding upon the parties, or it is of no force,—and you may be ousted of the possession of the road which you have obtained by virtue of the decree and the sale thereunder. There has been a foreclosure of the mortgage and a sale, and the appellants are in possession of the road by virtue of the title obtained by the sale under their decree of foreclosure,—and yet they say that their mortgage is not merged!

In *Freeman on Judgments*, § 125, the law is thus stated.

"The rendition of a judgment or decree establishes in the most conclusive manner, and reduces to the most authentic form that which had been hitherto unsettled. The cause of action thus established and authenticated is said to merge into the judgment, upon the same principal that a simple contract merges into a speciality."

When the appellants sought to foreclose their mortgage; when they asked the court to establish their rights under their mortgage, and enforce those rights, and when the conrt in consideration of the facts alleged and proved, rendered such decree as plaintiffs had asked for, and that decree was duly agreed upon, signed by the court and entered of record,—this was the acceptance of a higher security or obligation for the payment of the same debt, and was an extinguishment of the lower security or obligation for that debt.

A judgment or decree upon a contract extinguishes such contract.

Green v. *Sarmiento*, 1 Peters C. C. 74.
Butler v. *Miller*, 1 Denio 407.

And a bond or other sealed instrument, given as an obligation for a debt, extinguishes a simple contract liability or security for that debt.

Carson v. *Montino*, 2 Johnson 308.

"Because there cannot be liabilities on both instruments, and a judgment and a bond both import an absolute liability, the legal obligation of an inferior instrument must be considered as at once blotted out."

A joint judgment against all the obligors in a joint and several bond merges the entire instrument.

U. S. v. *Price*, 9 How. 83-94.

In like manner a judgment against one joint debtor o na joint cause of action, merges the liability of all.

Willings & Francis vs. Consequa, 1 Peters, C. C. 393.
Ward vs. Johnson, 31 Mass. 140.
Robertson vs. Smith, 18 Johns. 459.

The authorities are uniform that a higher security taken for a debt, extinguishes the lower or inferior security, and some of the foregoing authorities are to the point that a party by his own action often loses or extinguishes a security by changing the form of the debt. Thus as the general law stands today, a debt secured by the joint security of A and B will be merged into a judgment against A, and the security of B will be lost.

Eldred vs. Bank, 17 Wall, 545.
Mason vs. Eldred, 6 Wall, 231.

One of the questions in this case it seems to us is simply this:

Is a decree or judgment upon a contract of a higher nature than the contract itself?

A judgment is a contract of record and imports an absolute obligation. It is always classed as the highest in its nature, and is in its essence, the end of controversy. It is the result, the conclusion, the reduction to an authentic form of that which was before uncertain. It is verity itself and cannot be varied or contradicted by a recital of facts outside of it, nor by reference to the provisions of the contract on which it is founded. For if one party may go behind it so may the other, and it is absolutely conclusive and binding upon both parties or upon neither party.

In *Jones vs. Johnson*, 3 Watts & Sergeant, 276, it is said among other things: "The extinguishment of a lower security by a higher, is an operation of law, and that no intention of the parties can prevent it." See Smith's Leading Cases, Vol. 1, p. 396-7, fourth edition.

In the case of *The People vs. Beebe*, 1 Barb, 388, the court, holds the following language (the question being as to priority of liens, one party claiming under a judgment at law, and the other under a mortgage which had been foreclosed, the decree having been enrolled but not docketed:

"This mortgage was merged in the decree entered upon it which decree was enrolled but not docketed. The lien of the mortgage was thus extinguished and gone. That a judgment at law extinguishes the debt upon which it is obtained, is too plain a proposition to require argument or authority to prove. And I am unable to see why a decree of a court of equity should not have the same effect. Indeed it seems to me that the rule applies equally in both cases."

And where a mortgage stipulated that upon default, "it should only be necessary for the mortgagee to apply for an order to sell the mortgaged premises." Such order merges the mortgage so that it can no longer be made the foundation

of a suit, and any further proceedings to enforce the lien must be founded upon the order.

Ayres vs. Cayce, 10 Texas, 99.

And judicial proceedings whereby a decree is rendered upon a mortgage always have the effect to merge or extinguish it.

In the case last cited, the *order of sale* was held to merge the mortgage, and that any other proceeding to enforce the lien must be founded upon the order and not upon the mortgage.

In the case at bar, a foreclosure is had, the property ordered to be sold, and execution is issued to enforce the order. After that, the appellants came into a circuit court of the United States, a different court from that in which the foreclosure was had, and ask for further relief, not founded on the decree which is conclusive as to their rights under the mortgage, but upon the mortgage itself, which had been previously extinguished. In other words, having foreclosed and extinguished their mortgage by their own voluntary proceedings in a State court, they now come into a United States court and ask for a supplemental decree, by which it may be declared that they are entitled to something under their mortgage which they did not ask for nor receive in the State court. This we think they cannot do.

It is well settled in Iowa that a party cannot have greater relief in any case than he asks for in his petition or than the averments of his petition entitle him to. Code, section 2,885.

Cameron vs. Boyle, 2 Gr. 164.
Haven vs. Birch, 5 Iowa, 503.
Stadler vs. Parmelee, 10 Iowa, 23.

In the case of *Manigault vs. Deas*, 1st Bailey's, Ch. 283, it is declared that " if the mortgagee, instead of relying upon his legal

estate, treats his mortgage as a lien or incumbrance upon the property and claims to foreclose it by the judgment and decree of a court of equity, the decree of that court, giving effect to the lien according to its views of its extent, is a legal satisfaction, release or destruction of the mortgage itself."

By the law of this State, a mortgage is nothing but a lien an incumbrance, a security, except when the mortgage is upon personal property, in which case the mortgagee has the legal estate

The case cited from 1 Bailey (South Carolina) was in relation to slaves, which in some of the Southern States, and we believe in South Carolina, were by statute declared to be in some respects real estate and to be treated as such.

But if they were personal estate the case applies equally, for when, as in this case, a party applies to a court of equity to foreclose a mortgage, he thereby claims but a lien or incumbrance on the subject of his mortgage, and the decree establishes the extent of his right.

We have already seen that where a contract is merged in a judgment or decree, the plaintiff cannot go behind such judgment or decree and found any right or relief upon such contract.

Goodrich vs. Dunbar, 17 Barb, 644.
Ayers vs. Cayce, 10 Texas, 99.

Of course this is equally, if not more strongly the case where a United States court is called upon—as in this case—to declare that a party has greater right than has been given to him under a contract upon which a decree has been obtained in a State court.

In the case of *Green vs. Sarmiento*, Peters C. C. 75, it is said: "The judgment of a State court is conclusive in United States courts, and is a complete extinguishment of the original con-

tract wherever made. And the courts cannot go behind the judgment to consult the contract on which the judgment was rendered."

Now the appellants in this case ask this court to do just what it is declared in the case last cited it cannot do, namely to go behind the judgment and decree of the State court, consult the contract on which that decree was rendered, and see whether or not, by the terms of that contract, they were not entitled to the rents and profits, the earnings of the Des Moines Valley Railroad.

We cannot think for a moment that this court will consent to embark upon any such voyage of discovery. But if it should from any motive, be induced to do it, it will find that the appellants had the right by the terms of their mortgage, upon default being made in payment of interest, upon request of a majority in interest of the bondholders, to take possession of the road and collect "all tolls, freights, incomes, rents, issues and profits of the same."—Record pp. 24–5.

It will further find that appellants never took or demanded possession of the road; that in their petition to foreclose their mortgage, they do not ask for the appointment of a receiver, and make no allegations which would justify such appointment; that no disposition of the earnings of the road is asked for, that the possession of the road by the D. V. R. R. Co. is not in any way disturbed, or proposed to be disturbed, but that said company is left in possession of the road and in receipt of its earnings, with full power to dispose of the same as it might think proper.

It will further be found that the appellants might have taken possession of the road, or that they might have demanded possession of the same. That if possession had been refused and the proper allegations and proofs had been made, it is possible

that a receiver would have been appointed, and that if a receiver had been appointed, and had taken possession of the road, and received the rents, incomes, &c. of the road between the date of the decree (May 31) and the time when a special receiver was appointed and took possession, (Sept. 15), then the appellants might have been entitled to the earnings of the road during that time. Otherwise not.

On looking through the whole record in the foreclosure case, (which is not before this court, but was in evidence before the court below), this court will find, as the court below did, that there were sufficient reasons why the appellants took no steps to have a receiver appointed in the State court, and why no steps were taken to have a disposition made of the earnings of the road before and pending the foreclosure proceedings.

The controlling reason may be educed from the situation of the appellants (who were trustees for the bondholders), in reference to the road, and their anxiety to get control of it. The bonds which the mortgage was given to secure were not due at the time the bill to foreclose the mortgage was filed, and would not become due for more than twenty years. (See copy of bond, p. 15 Record.) There were questions as to the right of the trustees to foreclose; as to the number of bonds negotiated; as to their ownership and locality, and as to the amount due upon the mortgage. (See records in foreclosure suit.) Neither the original mortgage nor the bonds could be produced upon the trial, and were not produced, and a question was made as to the validity of the mortgage. (See bill of exceptions, p. 51 Record.) The railroad company could delay indefinitely, if not defeat the foreclosure. The appellants object—their great desire—was to do the very thing which they now contend was not done, namely: to *merge their bonds and mortgages* as well as their *situation generally*, into something

which would establish their rights, and reduce them from chaos into some authentic form. The only thing which had sufficient capacity to swallow up the situation generally, and stand in its place and stead, was a *decree*, to be rendered speedily by some competent court, by which their mortgage should be recognized, and a certain amount by agreement be found to be due.

In order to do this, it was necessary that the railroad company should be conciliated; that no ugly questions should be raised, and that what could not be proved should be agreed to. If the understanding had been reduced to writing, it would probably have been in substance thus:

In consideration that the railroad company will not oppose a decree in this case, and will consent to what it would be very difficult for us to establish by proof, the road shall remain in its possession, and it shall receive the net income until the road is sold and the purchaser shall be entitled to possession under his deed; and we further agree that the following shall be made a part of the decree:

"And it is further ordered that the purchaser at said sale of the railroad of said company, shall take the same subject to the claims of the employes and officers of the road, and all others for labor in the operation of said railroad, to an amount not exceeding $100,000.00."

Or, to translate the same into plain English, the appellants say to the railroad company:

"We will leave the road in your possession, and you may make what you can out of it, and we will give you in addition the sum of $100,000.00, if you will allow us to take a decree."

The railroad company was equal to the emergency. It retained the sole and absolute control of the road, and collected the rents and profits. It made no "factious" opposition to anything the appellants required. It even went so far as to

release its right of redemption, and to agree that the road should be sold without appraisement. (See bill of exceptions, page 52, Record, and release of right of redemption, page 57 Record.)

The above quoted paragraph is taken verbatim from the original decree rendered in the foreclosure case. By the amended decree it was modified, as will be seen by reference to page 62 of Record. The alterations appear in italics; and the whole of the succeeding paragraph, commencing with the words "But in order," etc., is absent in the original decree.

Not having been present during the negotiations between the trustees—the appellants in this case—and the Des Moines Valley Railroad Company, we cannot say that we have stated them in the precise manner and order in which they occurred; but we do say that the situation of the parties, and the fact that the railroad company was left in possession of the road, and in receipt of its earnings, with no provision for their application being made, and the further fact that the purchaser of the road was to be charged with a sum not exceeding (not less than) $100,000.00 to pay officers and operating expenses — thereby making the road worth just $100,000.00 less than it otherwise would have been, justifies and proves the conclusion that the appellants had no claim to the earnings of the road between the times contemplated; and that they had released them to the railroad company for the above named or some other consideration.

There was reason, then, and sufficient reason, why the appellants did not in their petition ask for the appointment of a receiver.

They, as we believe, had agreed not to do so. They had released all right to the earnings, both by *not claiming* them and by agreement not to claim them.

"But, to set this matter beyond dispute, and to show not only that the plaintiffs did not originally intend to have a receiver appointed, whereby they might set up some claim to the earnings of the road, we now aver that when some of the defendants, in view of the extraordinary provisions in the decree, making the purchaser subject to the payment of $100,000.00 for operating expenses of tho road, whereby its value was lessened to just that amount, moved for the appointment of a receiver, the *trustees objected thereto*, and the *court sustained their objection.*" (See bill of exceptions.)

By reference to the bill of exceptions in the record, the transaction disclosed in the last paragraph is not contained in it; but there were two bills of exceptions filed in the foreclosure case, and one of them does make the above a matter of record.

(The said paragraph is marked quoted, and is taken from the printed argument filed by the writer in this cause when it was submitted to the circuit court, and no question was made as to its correctness by the reply to said argument. The whole record in the foreclosure case was in evidence on the trial of this cause in the court below, and we do not see how this court can re-try it without the same evidence.)

There is a little circumstance in the case which we cannot refrain from referring to, as tending to prove that if the appellants had any claim to the earnings of the road, pending the foreclosure proceedings, they had released them to the railroad company.

In the paragraph of the amended decree immediately following the one providing for the payment of $100,000 by the purchaser of the road to the officers and employes, and at its conclusion, the special receiver therein provided for is directed to apply the earnings of the road to operating expenses, and

pay over the balance to the "*railroad company, or in pursuance of its direction.*"

Now here was a plain recognition, nay more, a declaration, of the fact that the railroad company was to have all it could make, or all the receiver could make, by operating the road, until it should pass into the hands of the purchaser, and is significant as showing the direction the net earnings of the road were to take, and their ultimate destination. They were to go into that "receptacle of things lost upon earth," the hands of the Des Moines Valley Railroad Company.

This portion of the amended decree is decisive of the question as to where the earnings of the road were to go. The appointment of the special receiver was not to change their destination. He was to pay them over to the railroad company; and, as the record stands, he was ordered to do so by the State Court, (p. 62 Record.)

We have been finding fault with the record in this case, and have contended—and do still contend—that this court cannot re-try it, because all the evidence is not in the record. Neither the original or the amended decree is before this court. We find by reference to our printed argument in the Circuit Court, made when we had the whole record before us, that, while the amended decree contained in the record is just as it was drawn up and printed, and proposed, yet that, some one, by what authority we know not — thinking perhaps that the direction to pay the net earnings to the railroad company — was an admission that would be too damaging to the prospects of the case, which was then pending, has quietly run his pen through the words, "to said railroad company, or in pursuance of its direction," and then inserted the words "to such *person* as the court shall hereafter order." We do not think the alteration at all important, nor that it had or was intend-

ed to have the effect to change the destination of the net earnings of the railroad, but as the only reliable record of the cause is to be found by references in the arguments heretofore filed in the cause, we give the appellants the benefit of this. If they prefer to stand by the record as it is in this particular we have no objection.

But in view of the above facts and others disclosed by the whole record — which was before the Circuit Court — well might that court say and find, as it does with the last paragraph of its opinion in this case: "Since the railroad company, before and pending the foreclosure were left in the possession of the road, and since no attempt to disturb it was made, nor receiver applied for, or provision made in the decree as to the earnings between the decree and sale, I am impressed with the belief that the plaintiffs in the foreclosure suit, did not intend to disturb the possession of the company, and that no question would have been made as to the earnings or their application, if the telegraph company had not levied its execution. On the whole I think the bill ought to be dismissed."

Seeing that, under the law, the title and possession of mortgaged property, and the right to the income remains with the mortgagor, unless stipulated to the contrary; that if stipulations to the contrary be made, the mortgagees right depends entirely upon such stipulations, that the stipulations in this case are that the trustees may, on default, take possession and receive the earnings, that, although default is alleged, the trustees never took nor demanded possession, and that without such demand they have no standing in court, the appellants modestly ask that *this proceeding* may be considered as a demand! Well, if the amended decree is to be considered as having been entered three or four months before it was made,

and to have the force of a *nunc pro tunc* order, we do not see why a suit in equity in the United States Court, to enjoin a creditor from attempting to collect his debt may not be contrued into a demand upon a railroad company for possession of of its road! It is, according to appellants theory, simply a question of construction, and construction is a matter of discretion, and discretion has no rule to govern it.

If the court will accommodate the appellants, and consider as having been done by them all that they ought to have done in order to avail themselves of the earnings of the railroad; if, because they once were in a position to have secured what they now profess to desire, the court will still consider them in the same position, all contraversy with appellants as to their legal rights, or as to those of the telegraph company will indeed be profitless.

But it is because the right of appellant to the earnings of the road during the time they are claimed by the telegraph company, never attached, and does not now exist; because the right was parted with, abandoned, released to the railroad company, and the earnings placed where they might be applied toward the payment of the debts of the railroad company; that the attempt was made to have them so applied.

IV. After the decree of foreclosure had been rendered, a special execution was issued, which was returned on the 1st of September 1873, wholly unsatisfied. (See Record p. 56.)

After the return of this execution a motion is made by trustees in first mortgage for a new trial or for a modification of the decree in the foreclosure case for reasons;

1st. The decree requires the whole property to be sold as an entirety; whereas the two mortgages cover different parcels of property; part of the property included in the last mortgage is not included in the first.

2nd. Because the decree requires the officer who is directed to sell the property to receive no bid for less than two million dollars on the whole property, part of which is not in the first mortgage. (See p. 57 of Record.)

This application was the sole ground and showing for all the amendments made to the decree. Yet under cover of this application,—without any amendment being made to the original petition, or without any supplementary or other pleading whatever—a special receiver is appointed. His appointment was made on the 9th of September, and he took possession of the road, or pretended to do so on the 15th of September.

The execution under which the road was sold was issued on the 16th of September—the next day after the appointment of the receiver. The receiver appointed was so only in name. He was not required to qualify, nor give bond, but was appointed to do just what the railroad company had been doing, namely, to receive the earnings and pay the net proceeds to the railroad company—no part of the money received by this special receiver was attached—nor is any part of it claimed by the Telegraph company under its execution. It is simply the net earnings between the day the original decree was rendered and the day the receiver took possession of the road that is claimed, under process issued by the Telegraph company on its judgment.

The order in the amended decree for the receiver to receive the earnings of the road between the first publication of the Sheriff's notice of sale, and the sale of the railroad, refers, of course, to the publication of the notice under which it was sold—there had been a publication of notice of sale under the first execution, which was returned, and a new decree was made—and a new execution issued thereon. The executions and returns thereon are stipulated as being in evi-

dence, but the record does not contain them (see Stipulations p. 53 of record).

We refer to these facts because it is claimed in argument, that the appointment of a receiver for any purpose, in any manner without any motion or showing therefor—at the instance of any one or no one—at any time will be construed into a *nunc pro tunc* order for a receiver.

The appellants seem to forget that when a receiver was asked for they opposed his appointment. They forget also, or ignore, the law that the rents and profits of mortgaged property can only be received by the mortgagees in the mode provided by the contract, or, that, if that mode be impracticable on account of the acts or conduct of the mortgagors, then in the mode provided by law.

We believe there is no conflict in the authorities on this subject. If, as in this case, the right to the earnings depend upon contract, or stipulation, and the stipulation provides the mode in which the earnings shall be received and applied, that mode must be pursued, or there must be some attempt to pursue it—a demand made of whatever may be necessary to practically receive and apply the earnings.

If such demand is refused, then the law points out the remedy.

There must be a foundation laid for the appointment of a receiver, by averment and proof of the necessary facts.

In this case the necessary facts would be, as we conceive:

The stipulation of the mortgage;

The demand for possession thereunder;

The refusal to surrender possession;

The insufficiency of the security without the application of the earnings;

The insolvency of the railroad company;

These facts being averred and proved would warrant the appointment of a receiver.

Insurance Co v. *Stebbins*, 8 Page 565.
Aston v. *Turner*, 11 Page 436.
Mitchell v. *Butler*, 51 N. Y. 447.
Classen v. *Cooley*, 5 Sandford N. Y. 447.
Strong v. *Dallner & Potter*, 2 Sandford 444.

But the case of *Galveston Railroad* v. *Cowdry*, 11 Wall. 459-482 is precisely in point, and, it seems to us settles the question adversely to the claim of the appellants in this suit.

We invite the attention of the court to that case. The direct question raised, was, "whether a mortgage of the tolls and income makes the mortgagor or his assignees accountable therefor before demand made by the mortgagee."

In that case, as in this, there was no demand made for the tolls and income. The language of the mortgage in this case, is substantially the same as that of the deed of trust in that case, and in that case as in this, there being provision for the trustees on default to take possession and receive the tolls and income and sell the road. Justice Bradly, refering to these provisions of the deed of trust, says:

"It seems to us that the latter clause defines and points out the manner in which the pledge of the tolls and incomes is to be practically carried into effect. At all events, until a *regular demand* were made for the payment of the tolls and income, we do not think under the language of the deed, that the defendants were bound to account therefor."

See also, *Noyes* v. *Rich*, 52 Maine 115, where it was held that a receiver appointed in a suit to foreclose a railway mortgage could not receive the earnings of the road accruing before his appointment. And see *City of Bath* v. *Miller*, 51 Maine 341.

The attorney for appellants professes to have examined these cases, and he does not think them applicable. He finds more

differences in the cases than he does *resemblances*, and because the cases are not *identical* he thinks they cannot be invoked in aid of the establishment of any principle contended for in this case.

The first difference he notices is, that the rents had been *reduced to possession* before demand was made. So here, the Des Moines Valley Railroad Company had reduced the tolls to possession, and there has been no demand made even unto this day.

The next difference is that, in that case, the bondholders permit a great length of time to pass before they set up their claims, etc. So, in this case, they have never set up a claim against the railroad company. They have simply tried to enjoin the telegraph company from collecting its debt; and while they say it is their lookout if they allow the railroad company to receive and apply the earnings for them, they have never dared to call upon the railroad company to disclose for whose benefit it was receiving and disbursing the earnings of the road; have never asked it to contradict the allegations of the answer of the telegraph company in this case, to-wit:

"That when defendants' execution was levied upon the earnings of said road, the same were being rightfully and legally received by the said railroad company, to and for its own use."

Nor have they offered any evidence upon that point, although the telegraph company claims to have proved said allegation by the facts and circumstances of the case.

But to return to the differences above referred to. It is said that in that (the Cowdry) case the tolls are conveyed when the company shall be in default of payment; while in this case they are immediate and unconditional. Is not this a "distinction without a difference?" No part of anything conveyed by

mortgage can be claimed until default; and in this State a mortgage does not convey the *title* to real estate, and the right to the possession and tolls depends upon specific stipulation. The stipulation in this case is, that in case of default to pay interest or principal, the trustees are authorized to take possession and "collect and receive the tolls, incomes, etc."

There must be a default, then, before there can be any claim to the tolls; and the trustees must take possession, or make a demand therefor, before they can receive the tolls.

There is no covenant upon the part of the railroad company to apply the tolls, etc., to the payment of the mortgage debt; and as long as it is left in receipt of such tolls—whether before or after default—it may apply such tolls in payment of its own debts.

The appellants' counsel also discovers more differences than resemblances between the cases in 51st and 52nd Maine, hereinbefore referred to, and this case, and finds them more unlike this case than the one they are supposed to sustain, and proceeds to show that the cases are not at all identical with the case at bar.

But the first case does show that if the plaintiff claimed a lien by virtue of a *statute*, he must enforce it in the *mode provided by statute*.

Now we think this illustrates the idea that if a party claims a lien by *stipulation*, that he must enforce it in the mode *stipulated*.

The other case, which he finds "even less in point," we think does hold that a receiver appointed in a suit to foreclose a railway mortgage could not recover the earnings of the road accruing before he was appointed; and it may be fully as much in point as the *nunc pro tunc* appointment of a receiver contended for by appellants.

The appellants demand protection from this court, and ask that the telegraph company be restrained from exercising a legal right—from levying its execution upon something to which they claim a right.

What the telegraph company has levied upon *was not in existence* until after the appellants had foreclosed their mortgage; until their mortgage was extinguished by being merged in the judgment and decree rendered on the 31st of May, 1873.

The appellants admit, in their argument, that the mortgage was merged by the decree to the extent of what they could sell by virtue of the decree, namely, as to the road and all of its appurtenances. And this admission, it seems to us, is fatal to the position they now occupy.

If their security by virtue of their mortgage upon the road was merged in a higher security, to-wit a decree directing the sale of the road to satisfy their debt, is it not folly to say that something that could only issue out of the road and inure to their benefit while their mortgage existed as a mortgage, was not merged also? Is the mortgage alive in part and dead in part? If the body be dead, can its breath be continued?

Appellants contend that because they did not demand or claim the earnings, nor ask for a receiver, but left the railroad company in receipt of the earnings, no one but themselves have a right to question the propriety of that act. Well, that possibly may be so; but creditors generally make it their business to levy upon property found in the possession and under the full control of their debtors—and especially is this the case when those supposed to have had, at some time, some right to such property waive their right; do not claim it; abandon it; extinguish it; release it.

And it very often happens that a creditor will hold, by levying an execution, property found in the possession of his debt-

or, simply because such possession is not satisfactorily explained, and when, as between the debtor and some third party, the third party would have the best right to it.

The telegraph company attached the earnings of the road, at a time when a final decree had been rendered in the foreclosure case, which had made no disposition of them. When no person was authorized thereby to receive them, and when the railroad company was rightfully in possession of the road by virtue of its legal title thereto, and rightfully in receipt of the earnings.

The right of the telegraph company to levy upon the earnings was a *legal right*, exercised by it when there was no impediment, nothing to hinder it, and which had been fully executed, and the benefit thereof fully vested, before any claim was made to such earnings by appellants.

And appellants do not claim the earnings now by virtue of any regular demand having been made, nor by virtue of any judicial proceedings alleged to be pending, nor do they propose by their bill in this case to commence any proceedings, but their argument is that the lien of the mortgage remains, notwithstanding the original indebtedness may be changed or merged in a judgment. And in support of this view, they cite the case of the *State of Iowa vs Lake*, 17 Iowa, 215.

By their own statement of that case it does not appear that any action was brought upon the mortgage.

An action was brought upon the *note* merely, and a judgment at law taken upon it. And the court says that the judgment upon the note merged it, or merged the *original evidence* of indebtedness, and the evidence of indebtedness existed thereafter *only in* the judgment. So, if the action had been to foreclose the mortgage, and there had been a decree of foreclosure, the decree would have merged the original

evidence of security, namely, the mortgage; and thereafter the only evidence of such security or lien would have been the *judgment* or *decree.*

There is nothing new or startling in this case, and we know not why it was referred to unless it was because it contains the words "the mortgage lien remains until the debt is satisfied."

The meaning of which is, simply, that no mere change of the form of indebtedness, where the debt remains the same, although evidenced by a new note, or even by a judgment on the note, releases the lien of the mortgage. But when there is a judgment or decree upon the mortgage itself, it is merged as surely as the note is.

The case is a good one for the telegraph company, and proves the only proposition necessary for it to establish, namely: that a judgment upon a contract merges the evidence of that contract, and that thereafter the evidence of the contract must be sought for in the judgment and not in the contract itself.

It never was held that a judgment upon a note secured by mortgage extinguished the mortgage.

Formerly it was no unusual thing for a person to bring suit upon the note at law, and proceed in equity at the same time to foreclose the mortgage securing the note, and it never was dreamed that one interfered with the other. On the contrary, the rule was "a party may pursue as many remedies as he may have for the same debt, at the same time, but he can have only one satisfaction."

A judgment therefore, at law upon a note secured by mortgage is no satisfaction of the mortgage, unless the judgment be paid, and this is all that was necessary to announce, and all that was intended to be announced in the case of *State vs Lake*, upon the particular point.

But since the case has been cited, we ask the court to examine it carefully, as it is a good illustration of one of the many ways in which the lien of a mortgage may be lost by judicial proceedings and the action of the parties, so far as third persons are concerned.

The case of the *State vs Lake*, and many more which by their *catch words* would seem to be in point, when examined are found not to be so. And no authority that we have been able to find affects this general proposition;

That when a party has gone into court to have his rights established and enforced, the judgment or decree establishing his rights and providing for enforcing them, is the *measure thereof*, and is the only evidence by which the extent of his rights is to be determined, and the courts cannot go behind such judgment or decree to consult the original contract on which such judgment or decree was rendered.

The case of *Riley's administrator vs McCuds administrator*, 21 Missouri, 287, depends entirely upon the construction of a statute of Missouri, and the question there was whether the lien of a mortgage was merged in a judgment obtained in a proceeding *under the statute* to foreclose a mortgage. We infer from use of the word "judgment" instead of decree, that the proceeding to foreclose a mortgage in Missouri under the statute referred to was a legal proceeding, and that the judgment itself did not establish a lien prior to its date, or at least that it was doubtful whether it did or not; but be that as it may, the case can have no application, or be of any authority except in Missouri, or where there is a similar statute; and certain it is, it does not apply to the general proceeding in equity to foreclose a mortgage;— for in such a case if a complainant will state what he is entitled to, and ask for appropriate relief —there is no need of his losing his security in the manner supposed.

One object of a proceeding to foreclose a mortgage is to have the lien judicially established, against all averments to the contrary — to ascertain and declare the extent thereof — and to provide for enforcing it. Accordingly in this case the court found the first mortgage to be the first lien on a certain portion of the road, and the second mortgage to be a lien subject to certain other liens, on another portion of the road, and the road and everything upon which a lien was found to exist was ordered to be sold, and the liens to be paid in their order, but no liens were found to exist upon the earnings of the road, none was claimed, no steps taken to assert a right to them until after the mortgage was merged in the decree.

There may be and doubtless is confusion arising from the indiscriminate use of the words *merged* and *extinguished* as applied to the lien of a mortgage.

The *lien* secured by a mortgage is not extinguished by foreclosing it. It is on the contrary established by such evidence as cannot be contradicted. And it might be more exact to say that the evidence of the security as it existed by the mortgage simply, and which was subject to be contradicted and defeated by defenses which the mortgagor might interpose, is merged in the decree, an evidence of a higher nature than that of a mortgage, which establishes what was before uncertain, and fixes the measure of the mortgagees right.

The appellants cite the cases of *Jessup vs. Bridge*, 11 Iowa, 573, and *Dunham vs. Isett*, 15 Iowa, 284, as applicable to the case at hand. The first simply decides that the earnings of a railroad company may be mortgaged.

The case of *Dunham vs. Isett*, decides among other things, that when a railroad and its earnings are mortgaged to secure bonds and interest, and the whole income of the road is insufficient to pay operating expenses and the interest as it accrues, such earnings are not subject to attachment.

This is doubtless true, and the case would be applicable here if there had been no foreclosure of the mortgage. In that case the mortgage was the highest and best evidence of the mortgagee's rights.

In the case at bar the evidence of the mortgage is merged in a higher and better evidence—the decree—which must be looked to to ascertain the extent of appellants' rights.

The cases of

Long vs. Mathieson, 2 Giff. 71,

Furness vs. Railway, 29 Beav. 358.

Are English cases, and depend so much on special statutes that they have no application to this case.

Nor can we discover anything in the case of *State vs. North Central.* 18 Md. 193, which has any bearing upon this case.

V. In order to sustain the injunction in this case, if it can be sustained at all, the complainants must prove the material allegations of their bill.

It is alleged in their amended bill in this case, (paragraph xi), that Gilman and Cowdry filed their bill in the Polk Co. Circuit Court to "foreclose their mortgage, for a sale of said road, and for the appointment of a receiver, &c."

It is also stated in appellant's argument, p. 3, that the 'original bill for foreclosure asked the appointment of a receiver." This is a mistake. The original bill for foreclosure did not ask the appointment of a receiver, and no amendment was made to it asking for the appoinment of a receiver. It is stipulated that a copy of said petition and any amendments thereto, is to be and is in evidence. But such petition is not in the record. How can the court review the case without all the evidence? In this as in every instance, we think where we have differed from the statement of facts made by appellants, either

the record or the finding of the Circuit Court has sustained us. We refer to p. 71 of the Record, where the court says: "Since the railroad company, before and pending the foreclosure, was left in possession of the road, and since no attempt to disturb it was made, no receiver was applied for, &c."

No receiver was applied for by appellants at any time. On the 8th of September, 1873, the trustees in the first mortgage applied to the court for a new trial, or to modify the decree, (see record p. 57), and on that application alone, all the amendments to and modifications of the original decree were founded. Neither the word receiver, nor any equivalent thereto, is to be found in the original petition or in any amendment thereto, in the original decree nor in the application to modify the decree.

The only application on file among the papers in the case for a receiver was filed in behalf of some of the defendants, and overuled. Upon what showing or authority the appointment of a special receiver was "injected" into the body of the amended decree it is difficult to imagine. But as the appointment of the special receiver was without prejudice to the rights of the Illinois & Mississippi Telegraph company it is immaterial to notice it here further than to show that one of the allegations on which the allowance of the injunction was predicated, namely, that a receiver had been asked for in the petition of the plaintiff in the foreclosere case, is not true. The appellants then have failed to prove the most important allegation in their petition.

The next allegations which the appellants were required to prove, are that the whole of the earnings of the road were necessary to operate it, and that its business would be materially injured, etc., by the garnishment.

Conceding for the purposes of this case, as it is not important whether it be true or not, that the earnings of the road

so far as necessary to operate it are exempt from garnishment, it is *not true*, that the whole of the earnings of the road were necessary and essential to operate it, and the only witness sworn in this case so testifies.

The testimony of Arthur Bridgman shows that the gross earnings of the road, between the 31st of May, 1873, and the 15th of September, 1873, during which time the road was operated by the Desmoines Valley railroad and it was in receipt of the earnings, were $218,887.75, of this sum there were applied to operating expenses and to other purposes $191,639.81, leaving the sum of $27,147.96, an amount more than sufficient at that time to pay the entire judgment of the Illinois & Mississippi Telegraph company.

It further appears from the same testimony (p. 49 Record Int. 12) that the sum of $25,000. part of the net earnings between the date of the decree and the date of the sale was paid by the railroad company upon other claims than those of the mortgagees, to-wit, upon judgments in favor of Flynn and others. The judgments of Flynn and others, were not leins upon the said earnings. They had issued no executions—they had not garnished said earnings. Their judgments were liens upon a specific portion of the road, and were ordered by the decree to be paid out of the proceeds of the sale of the second parcel of said road, to wit, the part lying between Desmoines and Fort Dodge. (see Record p. p. 63-4) The earnings were derived from the operation of the whole road.

The first mortgagees' lien upon the earnings or income of said road was limited to that portion of the road lying between Keokuk and Desmoines. The lien of the second mortgagees was limited to the portion of the road lying between Desmoines and Fort Dodge. By what authority was the whole in-

come of the road paid upon the Flynn and others judgments, which were directed to be paid out of another fund?

Did the claimants under the first mortgage assent to this? Did they agree that a large sum, most of which they were entitled to by the terms of their mortgage, should be paid upon a claim for which they were not liable? This is not likely. But we think the circumstance tends to show that the railroad company could and did apply the earnings of the road in such manner as they chose without consulting the mortgagees.

It further appears from the report of the special receiver, that during his short administration he was able to accumulate from the net earnings of the road and deposit as an indemnity to the persons who signed the injunction bond the sum of $30,000. And still the road was operated; repairs, ordinary and extraordinary made, and no part of the $100,000 provided for emergencies expended.

It was not true then, that the entire earnings of the road were necessary to operate it.

These facts, taken in connection with the provision of the decree for the payment of a sum not exceeding $100,000 by the purchaser of the road towards the operating expenses show that all the allegations of the appellants bill necessary to be proved, even in their view of the case, to sustain the injunction are without foundation in fact.

The exigency then which it was alleged demanded the injunction did not exist. There was nothing calling upon the court to restrain the execution of its own ordinary process issued in the ordinary manner to collect an ordinary judgment. The plaintiff, in the judgment at law, the telegraph compaay, had a perfect legal right to enforce the collection of its judgment and was proceeding to do so in a legal manner. It is rare, if ever that an injunction will be issued to restrain the exercise of a legal right.

Some of the authorities go so far as to say that it will not be done.

There are some questions not presented in this argument, because not adverted to in the argument of appellants, and as we think the decree must be affirmed on one of the grounds following:

1. Because there is no assignment of errors, and no such statement of the case made by appellants as is required by the rules of this court; or,

2. Because all the evidence before the circuit court is not before this court; or,

3. Upon the merits of the case, because no error has been shown in the decree.

We pass to the case to be submitted with this, namely, the case of

H. Coykendall, Garnishee, Plaintiff in Error,

vs.

The Illinois & Mississippi Telegraph Company.

While this case is, at the request of, and by agreement with the appellants in the preceding case, to be submitted with that, yet this is the extent of the agreement. It is for convenience, simply, that the cases are submitted together. One case does not necessarily depend upon the other. They are independent of each other, and each must stand or fall by what appears in the record concerning it. One case is brought here by appeal. The other by writ of error. One is to be tried upon errors of law merely, and the other upon both the law and the facts.

The garnishee alone has objected to the judgment in this case. He alone prosecutes a writ of error. It is only as to him that any error can be corrected, if there should be any, which we do not for a moment admit.

We suppose, however, that the rules of this court are as applicable to a garnishee who comes here upon a writ of error, as to any other party or suitor.

According to rule 21, a brief must be filed for plaintiff in error, containing--

1. "A concise abstract or statement of the case, presenting succinctly the quesions involved, and the manner in which they are raised."

2. "An assignment of the errors relied upon, which * * shall set out separately and specifically each error asserted and intended to be urged."

The brief of the plaintiff in error contains no statement of the case; nor does it contain any assignment of errors as required.

There is an assignment of errors attached to the record in the cause, and filed with it. See page 12, Record.

If this should be considered a sufficient compliance with the rule, so far as the assignment of error is concerned, the fact that no statement of the case is contained in the brief of plaintiff in error still remains.

Not knowing the precise effect of these omissions to observe the rules of the court, we proceed to make a statement of the case.

At the May term, 1872 of the Circuit Court of the United States for the District of Iowa, THE ILLINOIS AND MISSISSIPPI TELEGRAPH COMPANY recovered therein a judgment against THE DES MOINES VALLEY RAILROAD for the sum of $23,734.04. Record, p. 2.

The judgment remaining unpaid, on the 13th June, 1873, an execution was issued and placed in the hands of the marshal. Record, p. 3.

The execution was levied on the 16th of June, 1873, by attaching, as garnishees, a number of persons supposed to have money, or goods and chattels, in their possession belonging to the said railroad company. Record, p. 4.

H. Coykendall, one of the garnishees, having answered, on the 22d of October, 1873, a motion for judgment against him, on his answer, for the sum of $12,000 was made, and on that motion the cause, as to the said Coykendall, was continued. Record, p. 6.

On the 27th day of October, 1874, the said Coykendall having filed a further and additional answer, a motion was made for judgment against him on the answer and additional answer filed by him.

On the 29th of October, 1874, the cause came on to be heard, on motion of the plaintiff below, for judgment against Coykendall on his answers.

There was no stipulation in writing waiving a jury, but all the questions in the case, whether of law or fact, were submitted to the decision of the court, the plaintiff in error appearing by Gatch, Wright & Runnels, his attorneys, and the defendant in error appearing by Cook, Richman & Bruning, its attorneys. The court found in favor of the plaintiff below, and rendered judgment against the defendant for the amount claimed.

The next day the judgment was amended, on motion of the attorneys for garnishee, so as to read as follows:

"This cause came on to be heard this day, upon motion of the plaintiff, for judgment against H. Coykendall upon his answer as garnishee in this cause, the plaintiff appearing by

Cook, Richman & Bruning, its attorneys, and the said garnishee appearing by Gatch, Wright & Runnels, his attorneys; and the court being fully advised in the premises, finds that the said Coykendall had in his hands and under his control, between the time of his attachment as garnishee and the 15th day of September, 1873, the sum of twenty-seven thousand dollars of the moneys of the said Des Moines Valley Railroad Company, subject to garnishment. Whereupon said Coykendall, by his attorney, stated in open court that he was able to establish by other evidence the truth of all the matters and things stated in his said answer upon information and belief only, and asked leave to make such proofs thereof, which said request and leave were denied and refused by the court. Wherefore it is considered and adjudged that the plaintiff have and recover of and from said H. Coykendall said sum of twenty-seven thousand dollars, and that execution issue therefor; to which said finding, ruling and judgment the defendant excepted."

And afterwards on the same day the said Coykendall filed his bill of exceptions, which will be found on pages 7, 8, 9 and 10 of Record.

On the 18th of November thereafter, a writ of error was issued and filed in the clerk's office of the United States Circuit Court for Iowa, and the record of the cause was filed in this court Aug. 17, 1875.

The foregoing statement we believe includes every fact in the case which appears from the record, excepting only the matter set forth in the bill of exceptions.

ARGUMENT.

I. The bill of exceptions embodies the evidence in the case, and the only exception to any ruling of the court, is an exception to the action of the court in refusing to allow the garnishee to prove by "other evidence," the truth of certain matters stated in his answer upon information and belief. There is no exception to any finding of the court; there is no exception to the judgment.

Only such rulings of the court below as are excepted to at the time, and duly presented by bills of exceptions, can be reviewed by this court

Dickinson vs. Planter's Bank, 16 Wall. 250.

This would be the law applicable to the case, if it had been submitted under the act of March 3d, 1865.

But it was not so submitted. It was a case at law, in which there were questions both of law and facts to decide, and the whole case was submitted to the court. The court found as a fact that the garnishee had in his hands and under his control, between the time of his attachment as garnishee, and the 15th day of September, 1873, the sum of $27,000 of the moneys of the Des Moines Valley Railroad Company. The court also found that said sum was subject to garnishment, and rendered judgment accordingly.

The first question which presents itself is whether any of the questions, whether of fact or of law, decided by the court below can be re-examined and revised in this court upon a writ of error.

Prior to the act of March 3d, 1865, which established the mode in which parties could submit cases to the court without

a jury, and the manner in which a review of the law of such cases could be had in the Supreme Court, it had been repeatedly decided, that where parties waived a trial by jury, and submitted the whole case to the decision of the court, no question in the case, whether of law or of fact, and whether presented by bills of exceptions or otherwise, could be received upon a writ of error. That the court could not even by consent of parties, judicially find the facts in the case, and unless the facts were found by a jury, or admitted upon a case stated by the parties—referring the questions of law to the court—no question of law in the case could be reviewed upon a writ of error.

The judgment below in such cases must be presumed to be right and affirmed.

Campbell and others vs. Clement Boyean, 21 How. 223.
Gould and others vs. Frontin, 18 How. 135.
Saydam vs. Williams and others, 20 How. 432.
Kelsey and others vs. Forsyth, 21 How. 85.

In the last case cited, the court says:

"It is sufficient to say that the agreement of the parties cannot authorize this court to revise the judgment of an inferior court in any other mode of proceeding than that which the law prescribes, nor can the laws of a State regulating the proceedings of its own courts, authorize a Circuit Court sitting in the State to depart from the mode of proceeding and rules prescribed by the acts of Congress."

Since the act of March 3d, 1865, the rule is the same, except as to cases submitted under that act; and under that act, if parties who consent in writing to waive a jury, "desire to secure the right to a review in the Supreme Court of any question of law arising on the trial, they must file their written stipulation, and must then ask the court to make a finding

of such facts as they deem essential to the review, and ask the ruling of the court on points to which they wish to except. If this is not done, the parties consenting to waive a jury, stand as they did before the statute, *concluded by the judgment of the court* on all matters submitted to it."

Kearny vs. *Case*, 12 Wall. 273.

In this case there is no statement in the record that the parties waived a jury, but such waiver must be implied from the fact that the parties were present by counsel and went to trial without objection or exception.

Phillips vs. Preston, 5 How. 290.

Kearney vs. Case, 12 Wall. 284.

According to our views, then, there is no question in this case which can be reviewed by this court, and the judgment must be affirmed.

There is no finding of facts by a jury; there is no agreed statement of facts; there is no agreement as to what the evidence in the case proves.

The record exhibits the testimony and evidence laid before the Circuit Judge.

It is evidence of facts, but not the facts themselves as agreed or found.

The garnishee was the chief witness in the case. On his statement there was a general finding of liability.

The plaintiff in the court below claimed that the answers of the garnishee showed an indebtedness to the railroad company. The garnishee contended that they did not. The ultimate facts on which the judgment below was founded had to be established from the evidence. These facts are not found, nor presented to this court. But a bill of exceptions purporting to contain all the testimony is in the record. That testimony is evidence of the facts, but it is not the facts themselves.

And even under the practice in the State Court, where a jury is the exception and not the rule, either party could have demanded a jury, on the questions raised by the answers of the garnishee, and could have argued as to the ultimate facts established by the answer.

In the case of *Bebb vs Preston*, 1 Iowa, 460, it was held error for the court to refuse to allow counsel to address a jury in a garnishment case, when the only evidence was the answer of the garnishee.

II. We think we are not mistaken as to the situation of this case. Nor as to the questions really arising in it before this court.

But, lest we should be, we will present briefly what we have to say in reply to the argument of the plaintiff in error, and upon the merits of the case.

The plaintiff in error assumes that if he is right in his positions in the equity case, it will be unnecessary to consider this case. We have endeavored to show that one case does not depend upon the other. There is a judgment in the case against the garnishee and in favor of the telegraph company. That judgment was rendered by the court upon the evidence in this case; upon the proof that plaintiff in error had in his hands money or property of the Des Moines Valley railroad company.

The evidence showed that the garnishee was employed by the railroad company; that he was responsible alone to it. That all the money received by him was kept in common and remitted in gross to the secretary of the company. What the secretary of the company did with the money, it was no part of the business of the garnishee to know or care about.

Whether he apportioned it or kept the whole of it made no difference to the garnishee. The garnishee received it as the money of the company, and it *was* the money of the company.

The company was liable of course to other roads for their share of through freights, etc., but this was a general liability and created no lien upon the specific moneys received, and least of all did it create any responsibility on the part of the garnishee to any company except the one by which he was employed. It is idle, it seems to us, to urge as a reason why a garnishee should not be charged, that the person for whom he collected and held money was liable to a third party. The simple question is, could these third parties have maintained an action against the garnishee for moneys received by him in the course of his employment? Or, in other words, to whom was the garnishee liable?

He answers this question himself, (p. 10 Record), he says: "I was not in the employment of any person or corporation except the Des Moines Valley railroad company. * * I was not responsible to any other company or person for the moneys that came into my hands."

Such is a part of the evidence on which the judgment was rendered.

What has the other case to *do with* it? We might go out of the record and say that the object of the other suit was simply to restrain the prosecution of this. But the other suit, and its objects, cannot be considered in this case further than they appear in the evidence.

By the record it does not appear that there was any connection between the cases, or that the determination in one had any influence on that of the other. So, to state the objects of the other case and what was therein determined would be to go out of the record, as plaintiff in error does when he assumes that the judgment against the garnishee followed in the mind of the court as a corollary, from the conclusion that the earnings of the road could be levied upon by a judgment creditor.

Whether the earnings of the road could be levied upon by a judgment creditor does not arise in this case, and it is not discussed in the other case. If the court so held, it is not excepted to, assigned nor argued as an error in either case.

The plaintiff in error strings together quotations of a few words from each of a number of cases, and deduces therefrom the conclusion that the garnishee should have been discharged, because he says it does not "affirmatively appear that he had any money in his hands belonging to the railroad company."

Let us examine this for a moment.

It does appear that he was in the employment of the railroad company. (Record p. 10.)

It does appear that between the time he was garnished and the 15th of September 1873, he received the sum of $27,000 in money.

It does appear that he was responsible to the said company alone for the monies so received and that he remitted the same to its secretary. This appears positively, from his answers on cross examination. (Record p. 10.)

The spirit of all the cases cited by plaintiff in error, at least of all the Iowa cases, is :

That if the garnishee would be liable to the defendant in the judgment if he were prosecuting him, then he is liable to the garnishor to the same extent. The whole idea of a garnishment is to condemn the debt or property of the judgment debtor, which may be found in the hands of a third party, to the payment of the debt of the judgment creditor; and when a person is garnished he becomes the debtor of the garnishor just as he was before the debtor of the execution defendant.

Wilson v. *Albright*, 2 Gr. 125.

Williams v. *Housel*, 2 Iowa 154.

Fifield v. *Wood*, 9 Iowa 249.

"His liability is to be measured by his liability and relation to defendant, and he is to be charged in consistency with his contract with defendant."

"He is under the same liability to his garnishor that he would be to his creditor."

"And is in the same situation as if *defendant* were himself enforcing his claim against him."

Smith & Twogood v. *Clark & Henly*, 9 Iowa 241.

If garnishee fails to state material matter which he is bound to know or leaves it doubtful the presumption is against him.

2 *Iowa* 254.

His liability is to be determined by his accountability to defendant.

Drake on Attachments, § 498-522, 3, 4, 5.

Now, is there any doubt that the garnishee was liable to the railroad company for the money in his hands? The garnishee had no doubt of it, for he says he was responsible to no one but said company. We do not think a doubt has been expressed by any one except counsel of the plaintiff in error. And they did not express any doubt in the court below; at least when the court found that the answers of the garnishee declared a liability, there was no exception taken thereto (See bill of exceptions, Record p. 10.) When the court announced its conclusion in this respect the garnishee instead of excepting thereto asked for a new trial, in substance, by stating "that if time and opportunity were given to said garnishee he could establish by other evidence the truth of the several matters set forth in his answer upon information and belief only—and asked leave of the court to make such further proofs." This the court refused, and the refusal to open the case and allow the garnishee to prove what he had stated upon information and belief only, was excepted to, and nothing else. (See concluding part of bill of exceptions, Record, p. p. 10 and 11.)

Now, what was it he had stated on information and belief only? Simply that all the ticket and other agents of the road had been garnished at the same time he was, and that the earnings of the road constituted the sole means whereby it was enabled to operate its road. (See part of answer in brackets, p. 9 of Record.)

We must confess that we cannot see what the information and belief of the garnishee on the points stated, had to do with his liability. His liability to the garnishor, depended on his liability to the railroad company, and his liability to the railroad company is not denied.

We suppose it was intended under cover of this "information and belief" clause of the garnishee's answer to bring forward the idea, that the earnings of a railroad company could not be garnished, where they were necessary to operate it Hence the garnishee is made to say that he is informed that all agents who were receiving the earnings of the road had been garnished, that he is further informed and believes that the earnings constitute the sole means whereby the company was enabled to operate its road.

What view the court below held upon this point does not appear.

The testimony of the garnishee as to his information and belief was objected to when the answer was taken, and the objection noted. (p. 9 Record.) Whether the objection was urged upon the trial does not appear: and there is nothing showing that the court ruled upon the question. Whatever action the court took upon the matter, if it took any, was acquiesced in.

The ruling, if any was made, was not excepted to. It is not assigned as error.

If the court held that, under the law of Iowa, the *garnishee* could not make the defense that the fund garnished, (the

earnings of the road,) was exempt from garnishment, it would be going out of the record to say so; but, whether the court so held or not, such is the law.

In the cases of *Wales & Son vs the City of Muscatine*, 4 Iowa, 302, and *Stockton vs the City of Burlington*, 4 G. Gr., 84, it is held that the defendant only, (the railroad company in this case), could make any objections to judgment being rendered against the garnishee, which goes to show that the fund or indebtedness is exempt from execution. And in the same cases it was held that the objection that a party garnished is exempt from garnishment, is a privilege which the garnishee alone could assert.

By the law of this State the garnishee is not called upon, and is not permitted to make any defense to a garnishment proceeding except such as may be necessary for his own protection. The defendant in the execution, is, or may be a party to the proceeding. And any person interested in the fund attached, may become a party by intervention, and set up and have his claim adjudicated.

If the garnishee gives a plain statement, in regard to the money or property in his possession or under his control, belonging to defendant, and his answers show that he is liable to the defendant in the execution, that is all that is necessary to render him liable to the garnishor, and a judgment rendered against him is conclusive between him and the defendant.

Section 3212 of Revision of 1860 reads thus: "The judgment in the garnishment suit, condemning the property or debt in the hands of the garnishee to the satisfaction of the plaintiff's demand, is conclusive between the garnishee and the defendant."

If there is an indebtedness from the garnishee to the defendant—if the garnishee is responsible to the defendant in any sum, or on any account—he becomes, on being garnished,

liable to the garnishor in the same manner, and to the same extent that he was liable to the defendant; and any mere error or irregularity in the proceeding which does not affect him personally, and make him liable in a different manner or to a greater extent than he was liable to the defendant, cannot be taken advantage of by him.

The judgment against him condemning the debt is conclusive between him and the defendant.

By Section 3214, Revision of 1860, it is provided: "An appeal lies in all garnishment cases at the instance of the plaintiff, the defendant, the garnishee, or the intervenor."

Every person whose interest may be affected by the judgment in a garnishment case has the right to appeal from such judgment, but each must appeal for himself and in his own behalf.

A judgment cannot be reversed on appeal by a garnishee on grounds which do not affect him injuriously, and of which some other party might complain. Conley v. Chilcote 25 Ohio St Cumb Reg. Dec. N.S. p. 75-2

Houston, garnishee, v. *Walcott & Co.*, 1 Iowa, 86.

We have seen that the defense that the fund was exempt from execution cannot be set up by the garnishee, and the only question made by the bill of exceptions is the refusal of the court to allow the garnishee, after the case had been submitted and the decision announced, to prove a fact which might be important to the defendant, but which did not in any manner affect the rights or the liability of the garnishee.

But we affirm, and are prepared to maintain, that the defense hinted at by the garnishee—that the earnings of the road were necessary to operate it, and therefore not subject to attachment—even if set up by the defendant and urged by him, would be unavailing.

1. Because it is not alleged, even as the belief of the garnishee, that it required all of the earnings of the road to operate

it; and it may well be that while the road would be authorized to use so much of the earnings of the road as would be necessary to operate it, still the net earnings would be liable.

2. The earnings of a company organized under the general law of Iowa, for pecuniary profit, are not exempt from execution.

The property, rights, and credits of individuals are liable to seizure under execution or garnishment, except so far as they are specially exempt by law.

The property of corporations is liable in the same manner as that of individuals, except as provided by the law referred to. (Chap. 52, p. 10, Revision of 1860.)

The first section provides that "Any number of persons may associate and become incorporated, for the transaction of any lawful business, including the * * * construction of railways, etc., but such incorporation confers no power or *privilege* not possessed by *natural persons*, except as hereinafter provided."

The only powers or privileges conferred on such corporations, not possessed by individuals, are these, namely:

To have perpetual succession;

To sue and be sued by corporate name;

To exempt the private property of its members from liability for corporate debts.

There is no hint that the income or earnings of such companies shall be exempt from seizure for the payment of their debts. And as an individual can claim no exemptions, except such as are given by law, neither can a corporation.

It will be noticed that corporations may be formed for *all lawful purposes;* and that they are all placed upon the same footing. It is lawful to become incorporated for the purpose of manufacturing. Would a company formed for such a purpose be heard to claim its income and earnings as exempt

from execution, because it needed a part or all of them in order to carry on its business?

Railroad companies organized under the law of Iowa, are just like individuals, except in the particulars named, and like all other companies organized for any purpose under said law. If they cannot carry on their business, if they cannot pay their debts, they must like individuals, suffer the consequences; they must assign, go into bankruptcy, or be sold out.

If it were to be held that the income of all companies organized under the act referred to, was exempt from execution, we fear that every mercantile firm, every manufacturing establishment would become a corporation.

The laws of Iowa treat corporations just as they do individuals.

By sub-division 13 of section 29, Revision, "the word *person* may be extended to bodies, politic or corporate."

Every person who holds the money or property of another, or is liable to another, whether that other be a corporation or person, is liable to garnishment, municipal corporations alone excepted, and the Supreme Court of the state, in the case of *Caldwell vs. Stewart*, 30 Iowa, 379, say: "By this exception in the statute, the Legislature by implication say it is the only one intended."

We have said that the defendant—the railroad company—was a party to the garnishment proceeding. Its name appears in the title of the case, and it was actually present and represented by attorneys, at the hearing of this cause in the Circuit Court.

In the bill of exceptions (p. 10 Record), it appears that the plaintiff's motion for judgment having been submitted to the court and argued by counsel for the plaintiff, and for the said railroad company, representing also said garnishee, the court

took time to consider the same, &c. (The word "represented" in record is "representing" in the original bill of exceptions.

The defense sought to be made by the garnishee, as we have shown, concerns the railroad company only, yet the railroad company took no exception to the ruling of the court below and has not sued out a writ of error from this court.

The garnishee is not interested in any question which can be ruled by this court, and whatever the rights of the railroad company might have been, it will not be permitted to use the garnishee to protect them. The garnishee was liable to the railroad company for the money he had in his hands, and whether he pays it to the garnishor or the railroads company is immaterial to him, as the judgment against him protects him from all claims for the same money which may be set up by the railroad company.

Finally the only ruling excepted to in the court below was the refusal to allow plaintiff in error to introduce further evidence after the case had been submitted and decided.

This was a matter of discretion, and cannot be assigned for error, especially when as shown by the bill of exceptions, the garnishee had been allowed to make an additional answer, and the plaintiff's case had been delayed as therein stated. And when we consider that if the garnishee had been given the time required, and had proved what he proposed to prove, it would not have relieved him from his liability, we feel somewhat disposed to think that the exception does not deserve serious consideration.

We respectfully ask that the decree in the ~~proceedings~~ preceding, and the judgment in this case may be affirmed.

J. SCOTT RICHMAN,

Of Counsel for Appellee in the equity case, and for Defendant in Error in the law case.

Supreme Court of the United States.

ILLINOIS & MISSISSIPPI TELEGRAPH COMPANY,
Appellee,
ads.
GILMAN, CONWAY, and others,
Appellant.

ILLINOIS & MISSISSIPPI TELEGRAPH COMPANY,
Defendant in Error,
ads.
H. CAY KENDALL, Garnishee,
Plaintiff in Error.

ARGUMENT FOR THE APPELLEE AND DEFENDANT IN ERROR TO THE CIRCUIT COURT FOR THE DISTRICT OF IOWA,

BY

J. D. CATON,
Of Counsel with the Appellee and Defendant in Error.

Knight & Leonard, Printers, Chicago.

Supreme Court of the United States.

ILLINOIS & MISSISSIPPI TELEGRAPH COMPANY,
Appellee,
ads.
GILMAN, CONWAY, and others,
Appellant.

ILLINOIS & MISSISSIPPI TELEGRAPH COMPANY,
Defendant in Error,
ads.
H. CAY KENDALL, Garnishee,
Plaintiff in Error.

APPEAL FROM AND WRIT OF ERROR TO THE CIRCUIT COURT FOR THE DISTRICT OF IOWA.

May it please the Court:

These cases are so intimately connected that I shall argue them together.

The DesMoines Valley Railroad Company executed two mortgages upon all the property of the company to secure certain bonds. These mortgages were foreclosed in the State court, whose decree determined upon what specific property the mortgages were liens, and declared that in default of payment, within ten days, of the several sums found due a special execution should issue, commanding the

sheriff to sell the property, to wit: "The entire railroad of said company, with the appurtenances and franchises thereof, embracing all its real and personal property described in Schedules A and B, and to this decree annexed, and all other personal property owned by said company and used in the operation of said road, and including all that is included in the first and second parcels hereinafter described or so much," etc.— Printed Record, p. 61. On p. 67 Schedule A is found, consisting of engines, cars and tools, and Schedule C consists of outside lands.

This shows what the State court decreed to be sold.

This decree did not authorize the sale of any choses in action or debts due it, or cash on hand or money to be earned. Indeed, so far from this, the decree left the road in the possession and use of the company, and directed that the purchaser should take the property subject to the claims of the officers and employees for services, and other operating expenses of the road, between the time when the first notice of the sale should be given and the time when the sale should be made, not to exceed $100,000. (See printed Record, p. 62.)

This was the decree of the State court, showing its deliberate purpose to leave to the railroad company all the debts then due or to become due to it, and the gross earnings of the road which should accrue up to the time of the sale, to the amount of $100,000 at the least, and the net earnings beyond that amount. Now the record of the State court, which was put in evidence in this suit, shows that this decree was agreed to and entered by the consent of the complainants here, which, by every rule of law, must close their mouths against any complaint of its effect. Whatever the intention of the parties may have been, it is due to that court to presume that it designed that the moneys thus to be left to the railroad company should be applied to the payment of its honest debts, which were otherwise practically unprovided for in the decree, rather than to presume that it intended that the railroad company should take these earnings, and all it could collect of its outstanding debts, and divide up the proceeds among its officers or stockholders, leaving its debtors unpaid. Such, I may confidently assert, was not the intention of that court when it left all this untouched by the decree and in the hands of the company.

Long before this decree was entered the telegraph company had obtained a judgment against the railroad company in the United States Circuit Court, and while the decree was in the pro-

cess of execution by the sheriff the telegraph company took out execution on this judgment and levied it upon the moneys of the railroad company in the hands of its agents, which had been received or should be received after the entering of the decree. Thereupon, the complainants in the foreclosure suit filed this bill against the plaintiff in the execution, the railroad company and the marshal, alleging the proceedings and decree of foreclosure in the State court, our judgment in the federal court, and

"That the said Illinois and Mississippi Telegraph Company has issued a writ of execution on said judgment against said company, and has delivered the same into the hands of the United States Marshal for the District of Iowa, and has levied upon the cash *belonging to said company*, in the hands of the agents, at the various depots, by serving notice of garnishment upon them," and,

"That said moneys so in the hands of said agents *consist solely of the earnings of the said road for freight and passengers*, and that if said moneys be attached the business of said company as common carriers of goods and passengers will be materially hindered," etc., and then ask for an injunction to restrain the marshal from levying upon those moneys. This is the *gravamen* of the complaint, not that the moneys were not the moneys of the defendant in the execution, for they allege that they were; not that the complainants had any lien or claim upon those moneys, either under the mortgages or under the decree of foreclosure, but that the company might be embarrassed in the operation of the road, or that the road might be stopped, to the inconvenience of the public and the injury of the road, and so by this demoralizing effect, injure the complainants' security. This is the bed they made themselves, and we insist they shall lie upon it in this court as they were obliged to in the Circuit Court.

Notwithstanding, they aver that the money levied upon was the money of the defendant in the execution, and lay no claim whatever to it in the bill, they do a very strange thing. They go entirely outside the case made in the bill, and in their argument alone, practically insist that the Circuit Court should have sat as an appellate court to review the decision of the State court, and correct what they now conceive was an error in that decree. They now complain in their argument that the Circuit Court refused to give them more than the decree in the State court gave them — and they now ask this court to direct the Circuit Court to take the earnings of the road, which they aver in this bill belonged to the railroad company under

that decree, and give them to them and leave its own judgment against the company unsatisfied.

Now I confess that this shows a degree of assurance which I do not remember to have seen paralleled in judicial history. There is no claim in this bill, nor in the argument of counsel, that this decree gives them these earnings, but they asked the Circuit Court to go behind the decree, and as it were by way of supplement to it, give them what they now claim that decree should have given them, even against their wishes and consent as expressed in the decree itself.

Granting the appellate jurisdiction of the Circuit Court and its disposition to hear an appeal from, or writ of error to the State court, I should insist upon a release of errors resulting from the consent to the decree. We alone refused to consent to that decree and entered our exception of record, but finally concluded to waive the degradation of our claim to the lowest position of all, in consideration of the substantial provision made for its payment; but the moment we attempted to avail ourselves of this provision, the trustees hastened to repudiate their agreement, and asked that court, by a supplemental decree, to appoint a receiver and take from the railroad company the earnings which the original decree by agreement had left it. Now the cause of this new movement is very apparent. We had levied upon these earnings and the railroad company was likely to lose that which was designed for it or its officers alone. Then they rush into court and ask to take it from the company and give it to the trustees. In its opinion (which is a model of conciseness and cogency), the Circuit Court well says, "I am impressed with the belief that the plaintiffs in the foreclosure suit did not intend to disturb the possession of the company, and that no question would have been made as to the earnings or their application if the telegraph company had not levied its execution." I doubt not this Court will quite agree with the Circuit Court in its conclusion.

That the State court had complete jurisdiction of the subject-matter and of the parties will not be questioned, and that its decree was final and conclusive till reversed or modified by a revisory tribunal, in a regular mode, is equally clear. That decree acted upon the entire subject-matter and upon all the parties before it. It exhausted the subject, for it made no reservation of any portion of the subject-matter on which it was called upon to act, or of the rights of any of

the parties. Whatever that decree left to the railroad company belonged to the company, and might be disposed of by the company as it saw fit; and that was evidently the design of the parties who agreed to it, and of the court who rendered it. Indeed, the railroad company gave the trustees a valuable and abundant consideration for all it could make out of the use of the road for thirty days or so — for it released all equity of redemption, and consented to an absolute sale at a short day. Suppose the company had paid this money voluntarily to us, could these complainants have followed it into our hands and compelled us to pay it over to them? If the trustees had still a lien on these earnings, by virtue of the mortgage, notwithstanding the decree which left to the railroad company the use of the road till after the sale, then the earnings were trust funds, and the *cestuis que trust* could follow them so long as they could trace them. Such was not the intent of the parties or of the court. The plain question is, shall they abide the effects of this decree? Whatever that court decided must now be considered as *res judicatæ*. The court decided all that it was required to decide by the bill. In that bill there was no reservation withholding any matter that could arise under the mortgages. It was required to ascertain the amounts due the mortgagees, the subject of the mortgages — or what was encumbered by them to secure their payment — and to order the same sold for their payment. It passed upon all these questions, and its adjudication on them was final — no appeal having been taken. The Circuit Court could not in this case, no matter what the averments of the bill might have been, have inquired whether that court had determined that too much or too little had been ordered to be sold for the benefit of the mortgagees. When that court had decided that the earnings of the road while it should remain in the hands of the railroad company should not be applied to the payment of the debt secured by the mortgage, that decision was conclusive of that question. Suppose that court had found from the evidence that certain tracts of land had never belonged to the mortgagor or had been released from the mortgages by the trustees, upon such finding it would have simply omitted them from the order of sale, and such finding would have been conclusive upon all parties. Had the bill stated that a part of the mortgaged premises were not within the jurisdiction of the court, and asked that the rights of the mortgagees under the mortgages in such premises might be reserved in the decree, then a provision in the decree saving such rights might have preserved

the vitality of the mortgage as to those lands. But here there is no pretense in the bill and no intimation in the decree that there was anything encumbered by the mortgage which was not within the jurisdiction of the court — so that every question that could arise in the foreclosure was submitted to the court for its decision, and there is no intimation in the decree that any question submitted was not decided, and so the conclusion is inevitable that it decided the whole case, and fully settled the rights of the parties, and that is the *finale* as to those rights.

I do not propose to discuss the question of merger which has been raised in this case, but will leave that for the consideration of my associates, only repeating that whatever the court was called upon to decide, and did decide, is conclusive upon all parties, and cannot be inquired into in this collateral suit, and remarking further, that I understand the rule to be, that a decree entirely foreclosing a mortgage takes its place as a security and extinguishes it, because it is a higher security than the mortgage, the lien of the decree relating back to the date of the mortgage. It is a higher security because it is conclusive, and not open to attack or controversy, while the mortgage was but *prima facie* evidence of the parties' rights, and might be attacked or destroyed in a thousand ways.

There may be a partial foreclosure of a mortgage, as where but part of the debt is due, or a part of the land is out of the jurisdiction of the court. In such a case the facts should be stated in the bill, and the decree of the court specially providing for the contingency, stating what it concludes and what it leaves open for future remedies to be sought on the mortgage. In that case the mortgage is only extinguished by and lost in the decree *pro tanto.*

Now, let us assume that the Circuit Court could have gone behind the decree, and inquired whether that court was right in allowing to this road the profits arising from its use, while it was left in its possession. These mortgages pledge "the tolls, rents and profits to be had, gained or levied therefrom." The mortgages further provide that if default should be made in the payment of interest, or principal, for six months, then, at the option of the holders of one third of the amount of the bonds in the first mortgage or one half in the second mortgage, the trustees might take possession of the property, and "collect and receive all the tolls, gains or profits to be had or gained therefrom," etc. *These* are the "tolls, rents and profits"

mentioned and encumbered in the previous provision of the mortgage already quoted, and such has always been the construction of the parties to these mortgages. All of the tolls, rents and profits received by the railroad company during all those years we may well presume were always treated as the money of the road, and divided among its stockholders, or otherwise invested as they saw fit, for there is not a word in the mortgage to forbid this. They do not even promise in the mortgage to expend the profits in improving or extending the mortgaged property, nor is the least restriction put upon them as to the disposition of those profits, so long as the company should be permitted to retain the possession of the road.

The same clause is probably to be found in all railroad mortgages. Suppose this road had always paid its interest promptly, leaving a surplus of profits sufficient to divide among its stockholders ten per cent. per annum on their stock, would it be pretended that all these profits were pledged by these mortgages to the bondholders? And yet, if the construction contended for be correct, such was the case, and so the company had no right to use them for any purpose except to pay the bonds or interest, no matter what the surplus or how long before the principal would fall due. If the tolls always received by the company were pledged by the mortgages, then they were trust funds received by the officers of the road, and whenever they used them otherwise than for the payment of these bonds, they became personally liable for the misapplication of trust funds. I am sure my learned friends on the other side will, after mature reflection, hardly contend that such was the intention of the parties or a fair construction of the mortgages. Such a construction would lead to embarrassments which were never designed. Even complainants themselves insist that the money earned by this road up to the last moment was the money of the railroad company, for in their bill in this case they allege, as we have seen, that the money we levied on in the hands of the agents of the railroad company was the money of the company, and there is not an intimation in the bill that it was the money of anybody else, or that they had any lien upon it.

But I owe an apology to the Court for offering a word supplementary to its opinion in the case of Galveston Railroad *vs.* Cowdrey, 11 Wallace, 459, where this identical question was distinctly presented and fully decided by this Court. There it was held on a mortgage of the tolls and income of a road, of which the mort-

gagees might take possession three months after default, that the last clause defines the first, and the Court says: "At all events, until a regular demand were made for the payment of the tolls and income, we do not think under the language of the deed that the defendants were bound to account therefor." In the case at bar no demand was ever made of this railroad company for the payment of these tolls to the trustees till after we levied our execution. The foreclosure bill is silent on the subject, and even if we could imply such a demand from the mere filing of the bill, so much the worse for the complainant, for then the court adjudged that they were not entitled to the possession and use, for it refused to grant such demand, but left the earnings to be received and enjoyed by the railroad company, as we should presume, to enable it to pay its other debts, and especially ours, which was the most meritorious of all, so that it might die in peace.

In the argument filed on the other side, a strong appeal is made to the conscience of the Court, because of their superior equity to these earnings, which they say, in their bill, belong to the defendant in the execution. When we remember that every telegraph pole, and every yard of wire, and every battery and instrument placed upon these mortgaged lands became a part of the security and enhanced its value at least to the extent of the money which we advanced, and for which this judgment was obtained, it seems to us that a conscience that can see no moral equity in our claim, as compared with theirs,—which can appropriate the proceeds of our labor and money to the payment of their debt without compunction, and then come in and insist that it is unconscionable for us to claim what they had freely relinquished to the railroad company, must have been formed in a peculiar school, or worked upon by looking all the while on one side. At least, we do not think their moral equities are so commanding as to induce this Court to wrest the law from its proper course and give them more than the decree awarded them.

THE CASE IN ERROR BY THE GARNISHEE.

Proper respect to my learned friend whose argument has been already filed, requires that I should notice the position assumed by him in the case in error by the garnishee, and that is, that the proof shows that a part of this money attached was received for freights and passenger coupon tickets, to be earned or which had been earned by other roads.

The garnishee answers that he was the agent of this railroad company, and as such agent he received, between the time when the garnishee process was served upon him and the time when the receiver took possession, the sum of $27,000, which he remitted to the treasurer of the company. That of this a large portion belonged to other companies, but how much he did not know, for he had no means of ascertaining how much belonged to this company and how much to other roads; and this it is insisted shows that the moneys thus received were not all the moneys of this company. I respectfully submit that it shows the very reverse. He received the money as the agent of this company, and not as the agent of those other roads. The other companies never trusted him, but they trusted his principal only. He did not know which money was earned by the other companies and which by his own. The different moneys had no specific identities — no ear-marks to tell to whom they belonged. All was mixed together and remitted to the treasurer of this company as its money, and such manifestly was the intention of all parties. This company, in paying balances to other companies, if upon settlement any were found due them, did not select the identical money, received for their earnings, but drew its checks for such balances. All this $27,000 was manifestly deposited together to the credit of this company, and such, we may presume from our knowledge of affairs, was the usual course of business, and so understood and agreed to by all parties.

I am greatly comforted by the Iowa authorities cited by the gentleman on pp. 24 and 25 of his argument. I quote: "He (the garnishee) is not to be placed in a worse situation by the garnishment than as if the attachment defendant was himself prosecuting him." I cheerfully accept the rule. Suppose this were an action by the railroad company against this agent, to recover the $27,000 thus received by him, would it accept as satisfactory the answer that

a part of these moneys were earned by other companies, and so belonged to those companies, and hence this company could not recover them? I think I hear its counsel saying, "We are liable to those other companies, and not you. They did not credit you, but credited us alone. You received the money as our agent, and not as theirs. When you have paid us the money, they will have no claim upon you, but your entire liability will be discharged"; and so would any enlightened court instruct. Why did he pay these moneys over to the defendant in violation of his duty, and in defiance of the mandate of the Circuit Court, if he did not suppose they were the moneys of the company?

J. D. CATON,

Of Counsel with the Appellee and Defendant in Error.